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**THE GOVERNMENT OF VICTORIA**  
**(AUSTRALIA)**



THE  
GOVERNMENT OF VICTORIA  
(AUSTRALIA)

BY

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## PREFACE

I SHALL best explain the purpose of this work by a few lines of autobiography.

In May 1889 I was appointed to the Chair of Law in Melbourne University as successor to the late Dr. W. E. Hearn, so favourably known, not only in Australia, but also in England and America, as the author of *The Aryan Household*, *The Government of England*, and other works. Immediately upon my arrival in Melbourne, I found it incumbent upon me, in order to fulfil the engagements made by the Faculty of Law, to lecture upon a subject called "The Public Law of Victoria," of which I had not, at that time, any special knowledge.

In ordinary circumstances it would have been a sufficiently severe task to lecture to a large and critical audience upon a topic which I had not thoroughly studied. But in this case the hardship was intensified by the fact that I could find no text-book which would give me even an outline idea of the subject. The only authorities prescribed by the Faculty were the Acts of Parliament for the time being in force in Victoria on various branches of it.

The inadequacy of such a provision for the teaching of Public Law, in a country like Victoria, must be manifest. In Victoria, as in England, much of that which is most important in sound constitutional knowledge is never embodied in statutes at all. Judicial decisions, diplomatic correspondence, resolutions of the Houses of Parliament, political tradition and practice generally, form essential items in the list of the sources of public law. To expect a beginner to assimilate public law from a study of the statutes alone, is like expecting a foreigner to master the railway system from an examination of the time-

table. For a ripe scholar such as Dr. Hearn, who had grown up with and personally influenced the developement of the Constitution of Victoria, it was easy to explain and illustrate the subject, using the statutes as occasional evidence. But to myself, and, I believe, also to my students, such a course was not open.

In the circumstances, it seemed best for me to throw myself frankly on the confidence of my class, explaining to them the situation in which I was placed, begging their forbearance for imperfections, and promising them at the earliest possible moment something in the way of a text-book. I felt that this latter promise was especially due to those country students who, though obliged to pass the examinations, were unable to attend lectures. Upon them the circumstances bore especially hard.

I have now to thank the members of my class for the readiness with which they entered into my views, and the consideration which they extended to my shortcomings. During the lecture terms of the years 1889 and 1890, I was able, by dint of hard work, just to keep pace with their requirements. In fulfilment of my promise, I bring out this little book, having been more intensely convinced, as I have written each page of it, that the subject of which it treats cannot be grasped by an ordinary student without some other guide than the statute-book.

It will be seen, then, that this work is primarily a text-book for university students. It is not, and does not pretend to be, a manual for practitioners. I have not attempted to go, for example, into the details of election law or the practice of Parliamentary Committees. I have, in all cases, subordinated the professional to the scientific side of the subject. It has, in fact, been my steady aim to show that the body of government is not a mere collection of casual mandates, the arbitrary result of the surrender of individual independence to the control of the aggregate, but the vital offspring of the working of the spirit of order upon the chaos of circumstance, a true organism with a verifiable past and a conjectural future, with a structure well worth careful study, and with limbs and members whose function it is to effect and apply the political ideals of the community. With this object, I have commenced by sketching

the organism in its earlier stages of developement; when I have arrived at its present form, I have abandoned the historical method (except in a few details), and have subjected it to a process of dissection and analysis.

But although I have written primarily for university students, I have ventured to hope that my book will have an interest also for a wider class of students. Among the ever-increasing number of those who study the course of political developement, and the nature of political phenomena, there may be a few who will be glad to have a report upon the growth of English principles in a new atmosphere. There is so much in that atmosphere which reproduces the conditions of their ancestral home, that these principles have taken root with amazing firmness. On the other hand, so much is different, or rather, so much is wanting, that the variations which have followed from the change of climate seem to me intensely interesting and instructive. Many tendencies, at present only latent in English politics, or kept in check by powerful counter-influences, have in Victoria run their unhindered course, and can therefore be studied under the valuable condition of abstraction. Knowing and sympathising with the desire of students such as I have alluded to for simple, unalloyed facts, I have, so far as possible, avoided comment or expression of opinion in the body of the book. In the concluding chapter only, I have permitted myself to moralise. It is easy to skip a concluding chapter.

I should like also to think that a few of the more practically-minded persons who actually carry on the business of politics would make use of my work. I do not offer them views or opinions, but simply facts, and I have been amazed to find how many persons in important political positions (I do not allude specially to Victorian examples) are ignorant of the elementary facts of their subject. But, apart from these cases, in a country where every adult male has at least some influence on politics, there should be no lack of interest in political information. What, after all, is the good of democracy, unless it increases the intelligent interest taken by the members of the community in the problems of government? And the first condition of such interest is an adequate knowledge of the elementary facts of the case.



One word upon the title of my book. I have not (as I first intended) called it "The Public Law of Victoria," because I have thought that such a title might imply a more detailed statement of professional law than I intend to give. I have avoided the obvious name of "The Constitution of Victoria," because it seems to be the custom with English writers to confine the term "Constitution" to a very narrow sphere, limited, practically, by the direct action of Parliament and the central executive. I am strongly convinced that this practice has tended to obscure that most important side of the citizen's existence which is covered by the action of the local authorities, and I do not think that there is any sound warrant for it. But I am bound by precedent, and I have therefore used the expression "The Government of Victoria," to cover what I hope will prove to be a fairly complete, though by no means detailed account of the organs of government in Victoria at the close of the year 1890. Of the merits of those organs, judged by their practical results, I have said very little. That is a topic which I hope to take up in a later and more comprehensive work. But though I have not put in the shading, I trust that I have not omitted any important features in my sketch.

It now only remains for me to perform the grateful task of thanking those who have so kindly come to my assistance with information and encouragement. For the plan and execution of the book I am alone responsible. Notwithstanding that I have verified every relation which seemed to me of any real importance by reference to the original authorities, I dare not hope that I have avoided errors, and for such errors as there may be, I alone am to blame. But my special gratitude is due to Sir Henry Parkes, G.C.M.G., Premier of New South Wales, to the Hon. H. J. Wrixon, Q.C., late Attorney-General of Victoria, and to my colleague, the Hon. F. S. Dobson, Q.C., Chairman of Committees in the Legislative Council of Victoria, for the valuable help which their official experience and position have enabled them, and their courtesy has prompted them to afford me in explaining the actual working of the traditional machinery of government; to Mr. Donald Mackinnon, M.A., of Lincoln's Inn and the Victorian Bar, who has brought his great knowledge of the modern

statute law of Victoria to bear upon my proof-sheets ; and to Messrs. Dowden and Armstrong, of the Public Library, Melbourne, for their constant endeavours to lighten my always severe, and sometimes irksome labours in that valuable institution. The help of other friends has been acknowledged in the footnotes, in connection with the special matters in which their assistance has been so valuable.

MELBOURNE, *August* 1891.



## CHRONOLOGICAL TABLE OF PRINCIPAL DATES.

A.D.

- 1660. Appointment of Council of Trade.
- 1672. Appointment of Council of Trade and Plantations.
- 1675. The Council abolished.
- 1695. Revived.
- 1768. First appointment of Secretary of State for the Colonies.
- 1781. Abolition of office, and of Council of Trade and Plantations.
- 1783. Act authorising Transportation.
- 1801. Appointment of Secretary for War, with charge of the Colonies.
- 1817. Appointment of salaried Vice-President of the Committee of the Privy Council for Trade and Foreign Plantations.
- 1823. Statute authorising creation of Supreme Court and Legislative Council for New South Wales.  
Partial separation of Van Diemen's Land (Tasmania) from New South Wales.
- 1827. Appointment of salaried President of Committee for Trade and Foreign Plantations.
- 1829. Founding of Swan River Settlement (Western Australia).
- 1831. Lord Ripon's Land Regulations (enforcing uniform system of sale of Crown lands).
- 1835. Founding of Port Phillip (Victoria) by the Port Phillip Association. Proclamation of Sir Richard Bourke, claiming Port Phillip as part of New South Wales.
- 1836 (Sept.) Arrival of Captain Lonsdale as Resident Magistrate at Port Phillip.  
(Dec.) Arrival of first governor of South Australia.
- 1837. Formal founding of Melbourne and Williamstown.
- 1838. Quarter Sessions proclaimed at Melbourne.  
Founding of Geelong.
- 1839. Arrival of Mr. Latrobe as Superintendent of Port Phillip. Proclamation of Court of Requests at Melbourne. Proclamation of Port Phillip as a Squatting District.
- 1840. Founding of Portland.  
Order in Council declaring Melbourne a "Free Port" and "Free Warehousing Port."  
Land Regulations dividing New South Wales into three districts, and directing land to be sold in Port Phillip at non-competitive rates.

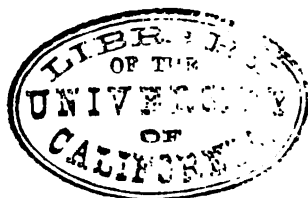
xii *CHRONOLOGICAL TABLE OF PRINCIPAL DATES*

- Sub-division of Port Phillip (squattling) district into "Westernport" and "Portland Bay."
1841. Founding of the Melbourne Market.  
Appointment of first District Judge of Port Phillip.
1842. Establishment of Registry of Deeds at Port Phillip.  
Incorporation of the town of Melbourne.  
Introduction of Representative Government into Australia (Constitution of 1842).  
The Crown Land Sales Act (introducing universal sale by auction).
1843. Protest of the Legislative Council against the Crown Land Sales Act.  
Sub-division of Port Phillip into four squattling districts ("Gippsland" and "Murray" new).
1844. Important Squattling Regulations.
1846. Addition of fifth squattling district ("Wimmera").  
The Legislative Council refuse to renew the Squattling Acts.  
Proclamation of the abortive colony of "North Australia."
1847. The Crown Lands Leases Act and the Orders in Council.  
Sub-division of the See of Australia.
1848. Proclamation of thirteen new counties in Port Phillip (16 in all).
1849. Revocation of "North Australia."
1850. Resolutions of Grievances by the Legislative Council.  
Passing of the Separation Act.
1851. Formal separation of Victoria from New South Wales.  
Discovery of gold in Victoria.  
Transfer of the Customs officials to the colonial staff.
1852. Creation of the Supreme Court of Victoria.
1853. Establishment of Road Districts and Central Road Board.  
Increase in numbers of Legislative Council.  
Appointment of Constitutional Committee.
1854. Excessive expenditure. Deficit.  
Establishment of system of urban municipalities.
1855. Report of the (Victorian) Royal Commission on the Land System.  
Increase in numbers of Legislative Council.  
Passing of the Act for the Government of Victoria.  
Change to Responsible Government.
1856. First meeting of Parliament under new system.  
Introduction of ballot for Parliamentary elections.
1857. Introduction of manhood suffrage for the Assembly and abolition of property qualification of members.  
Establishment of Board of Land and Works.  
Committee on the subject of Federal Union.
1858. Increase in numbers of Legislative Assembly to 78.
1859. Duration of Legislative Assembly reduced to three years.  
Separation of Queensland from New South Wales.
1860. Important Land Act.
1862. Important Land Act.
1863. Introduction of system of rural municipalities.
1867. Introduction of "protective" system of taxation on imports.
1869. Important Land Act.

*CHRONOLOGICAL TABLE OF PRINCIPAL DATES* xiii

- Important "Shires Statute."
1870. Introduction of practice of payment of members of Parliament.  
Committee on Federal Union.
1872. Uniform system of state-school teaching introduced by the Education Act.
1874. Passing of consolidating Local Government Act.
1879. Creation of office of Governor and Commander-in-Chief by Letters-Patent.
1880. Federal Conference at Melbourne.
1881. Increase in numbers of Legislative Council to 42 and tenure of seats shortened to six years.
1883. The Mallee Pastoral Leases Act.  
The Public Service Act.  
Establishment of Council and Minister of Defence.  
Federal Convention at Sydney.
1884. Important Land Act.
1885. Passing of the Imperial Federal Council Act.  
Adopted in Victoria.
1890. Federal Conference at Melbourne.
1891. Federal Convention at Sydney.





## CONTENTS

### INTRODUCTORY

#### CHAPTER I

##### THE HOME GOVERNMENT OF THE COLONIES PRIOR TO 1835

	PAGE
Theory of government in England . . . . .	1
Early foreign possessions of the Crown . . . . .	1
Their immunity from Parliamentary control . . . . .	2
Similarly with true colonies . . . . .	2
Position of the Privy Council with regard to the colonies . . . . .	2
The Commonwealth Committee . . . . .	2
The Council of Trade of 1660 . . . . .	3
The Council of Foreign Plantations . . . . .	3
The Council of Trade and Plantations (1672) . . . . .	3
Abolished 1675 . . . . .	3
Revived 1695 . . . . .	3
Abolished by 22 Geo. III. c. 82 . . . . .	4
The Committee of the Council for Trade and Foreign Plantations Receives a salaried Vice-President (1817) . . . . .	4
A salaried President (1827) . . . . .	4
The "King's Secretaries" . . . . .	5
Acquire official position under Henry VIII. . . . .	5
"First" and "Second" or "Northern" and "Southern" . . . . .	5
Tradition of a right to sit in Parliament <i>ex officio</i> . . . . .	5
Seats in the Council . . . . .	5
Recognised in Clarendon's scheme of government . . . . .	6
Appointment of a "Third" Secretary (for Scotland) . . . . .	6
Discontinued in 1745 . . . . .	6
Revived in 1768 (as Secretary of State for the Colonies) . . . . .	6
Abolished in 1781, with the Council of Trade and Plantations . . . . .	7
The "Office for Plantations" (department of the Home Office) . . . . .	7
Business of the colonies transferred to the Secretary for War (1801) . . . . .	7
Practice for Secretaries of State to be members of Parliament . . . . .	8
Extract illustrative of practice of Colonial department . . . . .	8



## CHAPTER II

THE LOCAL GOVERNMENT OF THE COLONIES (AND PARTICULARLY OF  
NEW SOUTH WALES) PRIOR TO THE YEAR 1835

	PAGE
Parliamentary legislation for the colonies at the end of the eighteenth century . . . . .	10
Canada . . . . .	10
India . . . . .	10
Formula for developement of colonial self-government in the nineteenth century . . . . .	11
Early government of New South Wales . . . . .	11
Governor Phillip's commission . . . . .	11
The 24 Geo. III. c. 56, and the Orders in Council . . . . .	11
The Vice-Admiralty Court . . . . .	11
The 4 Geo. IV. c. 96 . . . . .	12
The Supreme Court and the Court of Appeals . . . . .	12
The first Legislative Council . . . . .	12
Admission of non-official members . . . . .	13
Partial separation of Van Diemen's Land . . . . .	13
The Australian colonies become self-supporting . . . . .	13
The 9 Geo. IV. c. 83 . . . . .	14
Extension of powers of Supreme Court . . . . .	14
Courts of Quarter Sessions and Courts of Requests . . . . .	14
New Legislative Council . . . . .	16
Limited powers of legislation and taxation . . . . .	16
Members of the Executive . . . . .	17
The Executive Council . . . . .	18
The Commissioners of Crown Lands . . . . .	19
Condition of the other Australasian colonies in 1835 . . . . .	20

## PART I—MAGISTERIAL GOVERNMENT

## CHAPTER III

## THE FOUNDING OF PORT PHILLIP

The Port Phillip Association . . . . .	23
Grants of land from the aboriginals . . . . .	23
Constitutional position of the Association . . . . .	24
The ownership of land within the British dominions . . . . .	25
Sir Richard Bourke's Proclamation . . . . .	25
Confirmed by the Home Government . . . . .	26

CHAPTER IV

THE ORGANISATION OF PORT PHILLIP

	PAGE
Report upon the condition of Port Phillip in 1836 . . . . .	27
Appointment of Captain Lonsdale as Police Magistrate . . . . .	27
Attempts at self-organisation . . . . .	28
Arrival of Captain Lonsdale and staff . . . . .	28
Proclamation of the gaol . . . . .	28
Visit of Governor Bourke . . . . .	28
Proclamation of "Hobson's Bay" . . . . .	28
Melbourne . . . . .	28
William's Town . . . . .	28
Geelong . . . . .	29
Portland . . . . .	29
Importance of these towns in development of Victoria . . . . .	29
Quarter Sessions . . . . .	29
Arrival of the "Superintendent" (Mr. Latrobe) . . . . .	29
The under-treasurer . . . . .	29
The Clerk of the Peace . . . . .	29
The Court of Requests at Melbourne . . . . .	30
Division of Melbourne into "North" and "South" . . . . .	30
The incorporation of the town . . . . .	30
Proclamation of Melbourne as a "Free Port" and "Free Ware- housing Port" . . . . .	30

CHAPTER V

THE LAND SYSTEM OF PORT PHILLIP

Feudal theory of Crown ownership of land . . . . .	32
The theory applied to colonial lands . . . . .	33
Early practice in New South Wales . . . . .	33
Scheme of 1824 . . . . .	34
The Australian Agricultural Company . . . . .	35
The Van Diemen's Land Company . . . . .	35
Scheme of 1824 modified in 1827 . . . . .	36
Lord Ripon's regulations of 1831 . . . . .	37
First land sales in Port Phillip held under these Regulations . . . . .	38
Report of House of Commons committee in 1836 . . . . .	38
Appointment of "The Colonial Land and Emigration Com- missioners" . . . . .	39
Division of New South Wales into three Crown Land Districts . . . . .	40

	PAGE
Fixing of sale price of lands in Port Phillip at £1 an acre . . . . .	40
The (Colonial) Land Regulations of 5th December 1840 . . . . .	40
Fixed price and "special surveys" . . . . .	41
Abolished by the Home Government . . . . .	42
Effect of the Regulations of 5th December 1840 . . . . .	42
The other aspect of the land system—"squatting" . . . . .	43
Leases within the limits of location . . . . .	44
Occupation beyond the limits . . . . .	44
The new Squatting Act (2 Vic. No. 27) . . . . .	45
The Commissioners and the Border Police . . . . .	46
Working out of the scheme. Licenses . . . . .	46
Proclamation of Port Phillip as a Squatting District . . . . .	47
Subdivided into "Western Port" and "Portland Bay" . . . . .	47
Adoption of licensing system within the limits . . . . .	47

## CHAPTER VI

## EARLY INSTITUTIONS OF PORT PHILLIP

The Melbourne Market . . . . .	48
The District Branch of the Supreme Court . . . . .	49
Appointment of Mr. Justice Willis . . . . .	51
The Registry of Deeds . . . . .	51
The Corporation of Melbourne . . . . .	51
The burgesses . . . . .	52
The burgess-roll . . . . .	53
The Councillors and the Council . . . . .	54
The Aldermen . . . . .	54
The Mayor . . . . .	55
Separate Commission of the Peace for the Town . . . . .	55
Special Constables . . . . .	55
Assessors . . . . .	55
Auditors . . . . .	56
Grounds of exemption from office . . . . .	56
The Town Clerk . . . . .	56
The Treasurer . . . . .	56
The Surveyor . . . . .	56
Committees . . . . .	57
Powers of the Corporation . . . . .	57
The "Town Fund" . . . . .	57
The "Police Fund" . . . . .	58
By-laws . . . . .	58

## CONTENTS

Lighting, streets, and drains	xix
Resemblance between the Melbourne Corporation Act and the 5 & 6 Will. IV. c. 76	58
Amendments of the Corporation Act	59
	60

## CHAPTER VII

### GENERAL CONDITION OF PORT PHILLIP IN 1842

Official staff in 1842	63
Revenue and Expenditure	65
Population	65
Crown land sales	65
Produce of the land	65
Live stock	66
Shipping	66
Exports and Imports	66

## PART II—REPRESENTATIVE GOVERNMENT

## CHAPTER VIII

### THE NEW CONSTITUTION (1842)

Indifference of England to Colonial questions in 1842	69
Importance of the Constitution of 1842	69
The new Legislative Council (partly elective)	69
The electoral districts	70
The franchises	70
Qualification of members	70
Method of appointing nominee candidates	70
Vacation of seats	71
Sessions and duration of Councils	71
Method of action	71
Legislative powers	72
Bills which must be reserved	72
Right of disallowance by the Crown	72
Financial powers of the Council	72
Limitations thereon	72
The Civil List	73
Summary of the Constitution of 1842	75

## CHAPTER IX

## INAUGURATION OF THE NEW CONSTITUTION

	PAGE
Proclamation of the New Constitution . . . . .	77
Last meeting of the old Legislative Council . . . . .	77
The new Electoral Act (6 Vic. No. 16) . . . . .	77
The elections for Port Phillip and Melbourne . . . . .	82
First meeting of the new Council. Appointment of Speaker . . . . .	84
Absence of the Governor . . . . .	84
Opening Speech . . . . .	84
The Electoral Court . . . . .	84
Disputed election at Melbourne . . . . .	84
General character of the new Constitution . . . . .	85

## CHAPTER X

## LOCAL GOVERNMENT

Difference between English and Australian Constitutions . . . . .	87
Scheme of local government contained in Constitution of 1842 . . . . .	87
District Councils . . . . .	87
Powers . . . . .	88
By-laws . . . . .	88
Local taxation for police purposes . . . . .	88
Criticism of the scheme . . . . .	89
Comparison with the corporate powers of Sydney and Melbourne . . . . .	89
History of the scheme . . . . .	89
The Charter of Maitland . . . . .	89
Opposition to the plan . . . . .	90
Introduction of bill to widen the municipal franchise . . . . .	90
Adverse vote in the Legislative Council . . . . .	90
Failure of the scheme . . . . .	91
Elective Road Trusts substituted . . . . .	91
Reasons for the failure . . . . .	91

## CHAPTER XI

## THE LAND QUESTION

Difficulties in studying the Land Question . . . . .	93
Three aspects of the question. Sale, Squatting, Quit Rents—	

## SALE

The Crown Land Sales Act of 1842 (5 & 6 Vic. c. 36) . . . . .	94
---	----

# CONTENTS

	xxi
	PAGE
General principle—no alienation except by public auction . . . . .	94
“Town,” “Suburban,” and “Country” lots . . . . .	94
The minimum upset price of £1 an acre . . . . .	94
Appropriation of Land Fund : one half to emigration, the other to Public Works within the colony . . . . .	95
Power to divide any colony into Crown Land Districts . . . . .	95
Reception of Act in New South Wales . . . . .	95
Appointment of Committee of Legislative Council . . . . .	95
Report of the Committee (December 1843) . . . . .	95
Criticism of the report . . . . .	97
The report adopted and sent to England . . . . .	97
Appointment of a second committee . . . . .	98
Its report (August 1844) . . . . .	98
Adopted . . . . .	98
Protest against the extreme views of the second report . . . . .	98
Answer to the Address of 1843 . . . . .	98
Opinions of Sir George Gipps on the subject . . . . .	99
Approved by the Colonial Land and Emigration Commissioners and the Secretary of State . . . . .	100
But promise of pre-emptive rights to squatters . . . . .	100
Reply to the Address of 1844 . . . . .	101
Action of the Legislative Council thereon . . . . .	101
Appointment of a third committee (1847) . . . . .	101
Report . . . . .	102
Beginning of the jealousy against the squatters . . . . .	102
Lord Grey's reply to the report of 1847 . . . . .	102
Order in Council of March 1847 . . . . .	103
Regulations thereunder granting commonage rights . . . . .	103
Appointment of fourth Committee (1849) . . . . .	104
Its report . . . . .	104
Criticism of the report . . . . .	105
Its demands once more refused by the Home Government . . . . .	106

## SQUATTING

Sub-division of Port Phillip into four squatting districts (1843) . . . . .	106
A fifth (Wimmera) added in 1846 . . . . .	106
Returns from the squatting districts . . . . .	106
Inadequacy of the revenue from this source . . . . .	106
Regulations of 2d April 1844 (limiting size of stations, and re- quiring separate license for each) . . . . .	107
Recommendations by the “General Hewitt” . . . . .	107
Criticism of the recommendations . . . . .	108
Unpopularity of Regulations and recommendations in the Colony . . . . .	108

	PAGE
The former condemned by the Report of 1844 . . . . .	108
Criticism of the arguments of the Report . . . . .	109
Despatch of Lord Stanley, enclosing Mr. Hope's measure . . . . .	109
Terms of the measure . . . . .	109
Discontent with the proposals . . . . .	110
Refusal of the Legislative Council to renew the Squatting Act . . . . .	110
Crisis. The Governor's suggestions for a compromise . . . . .	110
Adjournment of the Council . . . . .	111
Governor Gipps succeeded by Sir Charles Fitz Roy . . . . .	111
Disappearance of the difficulty . . . . .	111
Arrival of the 9 & 10 Vic. c. 104 . . . . .	111
Statistics of squatting for the year 1847-8 . . . . .	112
The Order in Council of 9th March 1847 . . . . .	113
Analysis of its provisions . . . . .	113
Carried out by Regulations . . . . .	115
Great extension of squatting . . . . .	116
Petition for squatting franchise in Port Phillip . . . . .	116

## QUIT RENTS

The cause of dispute . . . . .	117
Revival of the claims of the Crown . . . . .	117
Statistics in 1845 . . . . .	118
Address to the Governor requesting a stay of proceedings . . . . .	118
Regulations of October 1846 . . . . .	118
Disapproved by the Home Government . . . . .	119
Memorial of 1847 . . . . .	119
Address of 1848, praying absolute remission . . . . .	119
Answer of the Secretary of State . . . . .	119

## GENERAL

The Resolutions of Grievances of 1850 . . . . .	121
---	-----

## CHAPTER XII

## GOVERNMENT OFFICIALS AND ELECTIVE SEATS

Election of Sir Thomas Mitchell (Surveyor-General) for Port Phillip . . . . .	122
Expression of opinion by the Governor . . . . .	122
Resignation of seat by Sir Thomas Mitchell . . . . .	122
Lord Stanley's opinion . . . . .	122
Act on the subject introduced. Reserved for Royal Assent . . . . .	123
Consideration of the point . . . . .	123

## CHAPTER XIII

## SEPARATION

	PAGE
Growth of feeling in favour of separation . . . . .	125
Alteration of character of government at Sydney . . . . .	125
Unreal character of Port Phillip representation . . . . .	125
Proclamation of "North Australia" . . . . .	125
Division of the bishopric of Australia . . . . .	125
Practically a separate Executive for Port Phillip. . . . .	126
Motions by Dr. Lang in 1843 . . . . .	126
Petitions from Port Phillip (1844) . . . . .	127
Despatch of Lord Grey in 1848 . . . . .	128
Reception in the colony . . . . .	129
Action by the Legislative Council . . . . .	129
Petitions from the general public . . . . .	129
Election of Lord Grey for Melbourne . . . . .	130
Memorial from Port Phillip . . . . .	131
New elections for the District . . . . .	132
Effect of the memorial in England . . . . .	132
Report of the Board of Trade (4th April 1849) . . . . .	132
Analysis of the Report . . . . .	134
Approved by the Cabinet . . . . .	134
Reaches the Colony . . . . .	134
Further despatches from Lord Grey . . . . .	134
Resolution in favour of Responsible Government . . . . .	135
Separation announced . . . . .	135

## CHAPTER XIV

## GENERAL CONDITION OF PORT PHILLIP IN 1850

Population of Port Phillip in 1850 . . . . .	136
Occupations . . . . .	136
Sex and age . . . . .	136
Buildings . . . . .	137
Live stock . . . . .	137
Revenue . . . . .	137
Alienation of Crown Lands . . . . .	137
Expenditure . . . . .	137
Industries . . . . .	137
Imports . . . . .	137



	PAGE
Exports . . . . .	138
Shipping . . . . .	138
Crime . . . . .	138
Contrast between Port Phillip in 1850 and Victoria in 1890 .	138

## PART III—SEPARATE GOVERNMENT

### CHAPTER XV

#### THE NEW CONSTITUTION (1850)

The 13 & 14 Vic. c. 59 . . . . .	141
Separation of "Victoria" from New South Wales . . .	141
Boundaries . . . . .	141
Legislative Council . . . . .	141
Electoral franchises . . . . .	142
Disqualifications . . . . .	142
Powers of legislation and finance . . . . .	143
Restrictions . . . . .	143
Power to create a Supreme Court . . . . .	144
Existing laws continued . . . . .	144
Power to create new colonies . . . . .	145
Circumstances attending the passing of the Act in England .	145
Interest shown in Parliament . . . . .	146
Question of two chamber constitutions . . . . .	147
Loss of the "General Assembly" clauses . . . . .	147
General observations on the debate . . . . .	148
Criticism of the Act of 1842 . . . . .	149

### CHAPTER XVI

#### INAUGURATION OF THE NEW CONSTITUTION

Arrival of the Constitution Statute in the colony . . .	150
Despatch of Earl Grey (30th August 1850) . . . . .	150
Despatch to Sir William Denison (27th July 1850) . . .	150
Meeting of the (N. S. W.) Legislative Council . . . . .	151
Discontent of the Council with the new Constitution . . .	151
Its "protests" . . . . .	151
Mr. Westgarth's motion on boundaries . . . . .	152
The Act to continue officials in Victoria . . . . .	152

# CONTENTS

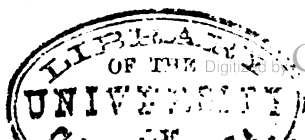
xxv

	PAGE
The Victorian Electoral Act . . . . .	152
Distribution of the constituencies . . . . .	152
Process of elections . . . . .	153
Provisions for deciding disputed elections . . . . .	154
The Victorian Laws Continuation Act . . . . .	154
Issue of writs for first elections to Victorian Council . . . . .	154
Discovery of gold in New South Wales . . . . .	155
Arrangements of the Executive for separation . . . . .	155
Commissions of the Governor-General, Governors, and Lieutenant-Governors . . . . .	155
Explanation of these arrangements . . . . .	156
Proclamation of the Governor-General in Sydney . . . . .	157
Proclamation of the Lieutenant-Governor and Executive Council in Victoria . . . . .	157
Analysis of the Commission of the Governor of Victoria . . . . .	157
Analysis of accompanying Instructions . . . . .	158
The Commission of the Lieutenant-Governor . . . . .	158
Criticism of these arrangements . . . . .	159
Discovery of gold in Victoria . . . . .	160
Issue of License Regulations . . . . .	160
Returns of the elections in Victoria . . . . .	161
Appointment of the non-elective members . . . . .	161
First meeting of the Victorian Legislative Council . . . . .	161
Election of Speaker . . . . .	161
Opening speech of the Lieutenant-Governor . . . . .	161
Disputed return for Geelong . . . . .	162
Standing Orders adopted . . . . .	162

## CHAPTER XVII

### TWO FINANCIAL QUESTIONS

Financial Settlement with New South Wales . . . . .	163
Transfer of Customs to the Colonial authorities . . . . .	164
The "Acts to regulate the Trade of the British Possessions Abroad" . . . . .	164
The 9 & 10 Vic. c. 94 . . . . .	164
Circular of 8th August 1850 . . . . .	165
Second circular of 19th April 1851 . . . . .	165
Directions to the Lieutenant-Governor . . . . .	166
Directions to the Collector of Customs at Melbourne . . . . .	166
The actual transfer . . . . .	167



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## CHAPTER XVIII

## LOCAL GOVERNMENT

	PAGE
The local government clauses of the Constitution of 1850 . . . . .	168
Report of Committee of 1852 . . . . .	169
Value of the report . . . . .	169
The Roads and Bridges Committee . . . . .	169
Constitutional history of roadmaking in N. S. W. . . . .	170
The "Central Road Board" of Victoria . . . . .	171
District Boards. Elective . . . . .	171
Power to levy rates . . . . .	171
Work done by the Board . . . . .	171
Origin of the scheme . . . . .	172
Local government in the towns . . . . .	172
The "Act for the Establishment of Municipal Corporations" . . . . .	172
Analysis of the provisions of the Act . . . . .	172
Municipal Councils . . . . .	172
Powers . . . . .	172

## CHAPTER XIX

## THE ADMINISTRATION OF JUSTICE

The Supreme Court Act 1852 . . . . .	174
Chief Justice and two Puisnés . . . . .	174
Jurisdiction of the Court . . . . .	174
Circuit Courts . . . . .	175
Appeal to Privy Council in certain cases. Reforms in Criminal practice, law of evidence, Courts of Sessions, Courts of Requests, jury system, and police law . . . . .	175

## CHAPTER XX

## THE LAND QUESTION

Crown Land statistics . . . . .	177
Desire to exercise the pre-emptive rights given by the Order in Council of March 1847 . . . . .	178
Increase of sales on discovery of gold . . . . .	178
Application for leave to use the Land Revenue to meet extra expenses of Government . . . . .	178
Grant of the revenue from gold licences . . . . .	179

# CONTENTS

xxvii

	PAGE
Qualified permission to use the other Land Revenue . . . . .	179
The Legislative Council address the Lieutenant-Governor to expend the Land Revenue . . . . .	179
Suspension of the sale of unsurveyed blocks . . . . .	180
Growth of the feeling against squatters . . . . .	180
History of the question . . . . .	181
Slow procedure under 9 & 10 Vic. c. 104 and the Order in Council . . . . .	181
Effect of the discovery of gold in increasing the demand for land	181
Mr. Fawcner's motion to extend the "settled" area negatived .	182
Amended motion to exempt homesteads agreed to . . . . .	183
Mr. Latrobe's Despatch of 7th September 1852 . . . . .	183
Answer of the Duke of Newcastle . . . . .	185
Report of the Royal Commission (June 1855) . . . . .	186
Statistics in 1856 . . . . .	187

## CHAPTER XXI

### THE NEW CONSTITUTION (1855)

The mining franchise . . . . .	189
Increase in numbers of Legislative Council, 1853 and 1855 .	189
Suggestion as to "Responsible Government" from Home authorities	190
Despatch of Sir John Pakington . . . . .	190
Action in New South Wales . . . . .	190
Analysis of Sir John Pakington's despatch . . . . .	191
Change of government in England . . . . .	191
The Duke of Newcastle's attitude . . . . .	191
Appointment of a committee to frame a new Constitution .	191
The Committee's resolutions . . . . .	192
Sources of the resolutions . . . . .	193
The bill in Committee of the Legislative Council . . . . .	193
Points altered . . . . .	193
Measure finally passed and reserved for Royal assent . . . .	194
The measure in England . . . . .	194
Criticism of Government proposals by Mr. Lowe . . . . .	195
Indifference of Parliament to the subject . . . . .	196
Debate on the second reading . . . . .	196
Committee . . . . .	197
Lords . . . . .	197
Royal Assent, 16th July 1855 . . . . .	197
The repeal of the Land Acts . . . . .	198

	PAGE
Despatch of Lord John Russell with Constitution statute . . . . .	199
Alteration of boundary by New South Wales Constitution statute . . . . .	200
Origin of the change . . . . .	202
Constitutional question as to the validity of the Constitution Act . . . . .	202
Question raised in the colony . . . . .	204

## CHAPTER XXII

## THE CHANGE TO RESPONSIBLE GOVERNMENT

Peculiarity of the Cabinet system . . . . .	206
Absence of reference to change in formal documents . . . . .	207
Covert allusions in Constitution Act . . . . .	207
And in Governor's Commission and Instructions . . . . .	207
Proclamation of the Constitution Statute and Waste Land Acts	
Repeal Act . . . . .	208
Question as to Responsible Officials . . . . .	208
Opinion of the Law Officers . . . . .	208
Protest of the officials . . . . .	209
Resignation of four other officials . . . . .	210
Their "release from office on political grounds" . . . . .	211
And re-appointment . . . . .	211
Minute of Sir Charles Hotham respecting Responsible Government	
(23d November 1855) . . . . .	212
Criticism of the Governor's views . . . . .	213
Proceedings which led to resignation and re-appointment of officials	213
Motion of Mr. Greeves condemning the proceedings, lost by one vote	214
Criticism of the proceedings . . . . .	215

## CHAPTER XXIII

## GENERAL CONDITION OF VICTORIA IN 1855

Material prosperity . . . . .	217
Excessive expenditure in 1854 . . . . .	217
Large deficit . . . . .	217
Loans . . . . .	218
The Land Revenue . . . . .	218
Enormous increase of official staff . . . . .	219
Improvement in 1855 . . . . .	219
Reduction in official expenses . . . . .	220
Population at close of 1855 . . . . .	220
Agricultural statistics . . . . .	220

	<i>CONTENTS</i>	xxix
		PAGE
Squatting . . . . .		221
Mining . . . . .		221
Manufacturing industries . . . . .		221
Exports and Imports . . . . .		221
Places of worship . . . . .		221
Education . . . . .		222
General view of the period . . . . .		222

## PART IV—RESPONSIBLE GOVERNMENT

### CHAPTER XXIV

#### INTRODUCTORY

Change of method . . . . .	227
Plan of the subject . . . . .	227
Distinction between central and local government . . . . .	227
Division of powers of each into legislative, executive, and judicial . . . . .	228
Order of discussion . . . . .	228

### *A. CENTRAL GOVERNMENT*

#### 1. *LEGISLATIVE*

### CHAPTER XXV

#### THE GOVERNOR

The Governor head of the Legislature . . . . .	230
Creation of office by Letters-Patent of 21st Feb. 1879 . . . . .	230
Analysis of Letters-Patent . . . . .	231
<i>a.</i> Powers . . . . .	231
<i>b.</i> Duties . . . . .	231
Analysis of permanent Instructions . . . . .	231
<i>a.</i> Powers . . . . .	231
<i>b.</i> Duties . . . . .	232
Powers by colonial statute . . . . .	233
Actual appointment of Governor . . . . .	234
Vice-Governors . . . . .	234
The Lieutenant-Governor . . . . .	234
The Administrator of the Government under standing Commission . . . . .	235
The Administrator of the Government specially commissioned . . . . .	235
The "deputy," temporarily appointed by the Governor . . . . .	235

## CHAPTER XXVI

## THE PARLIAMENT

	PAGE
Summoning, prorogation, and dissolution of Parliament . . . . .	236
Oath of allegiance . . . . .	236
Privileges of members . . . . .	237
Disqualifications for membership . . . . .	237
Methods of election . . . . .	238
"Provinces," "Districts," and "Divisions" . . . . .	238
Electoral Registrars . . . . .	239
"Elector's Rights" . . . . .	239
Lists prepared in December and June . . . . .	239
Revision courts . . . . .	239
The "electoral rolls" . . . . .	239
Returning officers . . . . .	240
Issue of writs . . . . .	240
Contents of writs . . . . .	240
Duties of returning officer . . . . .	241
Nomination of candidates . . . . .	241
Deposit monies . . . . .	241
The poll . . . . .	242
Declaration of result . . . . .	243
Election offences . . . . .	243
Decision of disputed elections . . . . .	244
Publication of Parliamentary reports . . . . .	245
Powers of legislation, general and special . . . . .	245
Practice under the 60th section of the Constitution Act . . . . .	246
Special duties of the legislature . . . . .	249

## CHAPTER XXVII

## THE LEGISLATIVE COUNCIL

Number of members in the Legislative Council . . . . .	250
Distribution of seats . . . . .	250
Tenure of membership . . . . .	250
Council incapable of dissolution . . . . .	250
Biennial elections . . . . .	250
Qualification of candidates . . . . .	250
Qualification of electors . . . . .	251
President of the Council . . . . .	251
His duties . . . . .	251

## CONTENTS

	xxx
	PAGE
Other officials of the Council . . . . .	252
Quorum of the Council . . . . .	252
Position of the Council with regard to money bills . . . . .	252

## CHAPTER XXVIII

### THE LEGISLATIVE ASSEMBLY

Number of members in the Legislative Assembly . . . . .	253
Distribution of seats . . . . .	253
Tenure of seats . . . . .	253
Dissolution and expiry . . . . .	253
Qualification of candidates . . . . .	253
Allowance for expenses . . . . .	253
Qualification of electors . . . . .	254
Election of Speaker . . . . .	254
His duties . . . . .	254
Quorum of the Assembly . . . . .	254
Special disability and privilege of the Assembly . . . . .	254
Position of the Assembly with regard to finance . . . . .	255

## CHAPTER XXIX

### OTHER LEGISLATIVE ORGANS

Position of Crown as legislative authority in England . . . . .	259
Position of the question in Victoria . . . . .	259
Delegated legislation . . . . .	259
The "Governor in Council" . . . . .	260
The Board of Land and Works . . . . .	262
The Public Service Board . . . . .	262
The Board of Public Health . . . . .	262
The Victorian Railway Commissioners . . . . .	263
The Supreme Court . . . . .	264
Unincorporated legislators . . . . .	265
Character of this non-Parliamentary legislation . . . . .	266

## 2. EXECUTIVE

## CHAPTER XXX

### THE EXECUTIVE COUNCIL

History of the Executive Council . . . . .	267
Its position before 1856 . . . . .	267



	PAGE
Official character . . . . .	268
Results of the character . . . . .	269
Dangers of a purely official council . . . . .	269
The Cabinet system devised to meet them . . . . .	269
Evolution of the Cabinet system . . . . .	269
Imperfect adaptation to Australia before 1856 . . . . .	270
Failure of the Constitutional Committee of 1853 to understand the system . . . . .	270
Settlement of the difficulty . . . . .	270
The Governor appoints the Cabinet . . . . .	270
Meaning of this rule . . . . .	271
Practice on a change of Ministry . . . . .	271
The power of the Executive Council in disposing of patronage . . . . .	274
Restrictions imposed by the Public Service Act . . . . .	274
Effect of the Act on the politics of Victoria . . . . .	274
Phases of the Executive Council . . . . .	275
The full Council . . . . .	275
The Cabinet . . . . .	275
The formal working Council . . . . .	275
Summary . . . . .	276

## CHAPTER XXXI

## RESPONSIBLE MINISTERS

The Officials in Parliament Act . . . . .	277
Peculiar wording of the provisions . . . . .	277
Actual arrangements . . . . .	277
Responsible Ministers partly paid out of the Civil List . . . . .	277
Functional character of the offices . . . . .	278
Chief offices usually found . . . . .	278
<i>The Chief Secretary</i> . . . . .	278
Former precedence lapsed on introduction of title of "Premier" . . . . .	279
Usual and special duties . . . . .	279
<i>The Treasurer</i> . . . . .	279
His duties by the Constitution Act . . . . .	279
History of a Government financial year . . . . .	280
Committee of Supply and Committee of Ways and Means . . . . .	280
Votes of Supply . . . . .	280
Consolidated Revenue Acts founded on resolutions of the Committee of Ways and Means . . . . .	281
Final Appropriation Act . . . . .	281
Taxation . . . . .	281

# CONTENTS

xxxiii

	PAGE
Special precautions on Customs Bills . . . . .	281
Collection and distribution of revenue . . . . .	282
The Commissioners of Audit . . . . .	282
"Collectors of Imposts," "Receivers of Revenue" . . . . .	282
"The Public Account" . . . . .	282
"The Trust Fund" . . . . .	283
"Paymasters" . . . . .	283
Treasury warrants . . . . .	283
Powers to vary the terms of appropriation . . . . .	283
"The Bank Sheet," "The Cash Sheet" . . . . .	284
The quarterly and annual statements . . . . .	284
<i>The Attorney-General</i> . . . . .	284
Legal Representative of the Crown . . . . .	284
Legal Adviser of the Government . . . . .	284
Administrator of the Legal Department . . . . .	284
Adjudicator in certain cases . . . . .	285
<i>The Commissioner of Crown Lands and Survey</i> . . . . .	285
Policy of Responsible Government with regard to Crown Lands . . . . .	285
Creation of Board of Land and Works . . . . .	285
Reappearance of Commissioners of Crown Lands and Public Works . . . . .	286
Creation of Vice-presidencies of Board of Land and Works . . . . .	286
The Land Act of 1860 . . . . .	286
"Country" and "Special" lands . . . . .	286
"Allotments" and "subdivisions" . . . . .	286
"Selectors" and close auction . . . . .	286
Limits of selection . . . . .	287
"Farmers' Commons" . . . . .	287
Sales by auction of "special" lands . . . . .	287
"Town Commons" . . . . .	287
The Land Act of 1862 . . . . .	287
Agricultural area of ten million acres . . . . .	287
Selection without competition . . . . .	287
Compulsory cultivation . . . . .	288
Abolition of old system of squatting, and substitution of assessment on capacity of run . . . . .	288
Runs to be disposed of by auction . . . . .	288
Limited claim to compensation or pre-emption . . . . .	288
The Amending Land Act of 1865 . . . . .	288
Abolishes the geographical reserve . . . . .	288
Selectors not to be entitled to immediate purchase . . . . .	289
Maximum limit of 640 acres . . . . .	289
Selectors' interest inalienable for three years . . . . .	289
Town lands still to be sold by auction . . . . .	289

	PAGE
The Land Act 1869 . . . . .	289
Two methods of purchase: occupation with improvement, and immediate payment . . . . .	289
Licences to occupy, with rights to claim purchase or lease . . . . .	289
Sales by auction . . . . .	290
Formation of Railway Fund . . . . .	290
Simplification of powers respecting commons . . . . .	290
Mallee Act of 1883 and Land Act of 1884 . . . . .	290
Nine classes of lands . . . . .	290
“Pastoral” may not be sold, leases to expire before 30th December 1898. Lease to first applicant, fixed rent according to estimated capacity of run. Interest of lessee inalienable except with permission, must destroy vermin. Crown may resume on three years’ notice. Tenant may select homestead . . . . .	290
“Agricultural and Grazing,” in “grazing areas” and “agricultural allotments.” Leases and rights to limited purchase after improvement . . . . .	291
“Auriferous” may be occupied for grazing purposes under licence . . . . .	292
“Auction.” Limited annual amount. Proceeds to “Railway Construction Account” . . . . .	292
“Swamp,” may be reclaimed and leased, but not sold . . . . .	292
“State Forests,” inalienable except for temporary purposes . . . . .	293
“Timber reserves,” may not be sold, but may be added, as cleared, to “agricultural and grazing” lands . . . . .	293
“Water Reserves” absolutely inalienable except for public purposes (General rules affecting these classes of land) . . . . .	293
“Mallee,” divided into “blocks,” subdivided into sections. Leases, for limited periods, sold by auction. The “Mallee Border” and “Mallee Allotments,” lease to applicants for limited term. Mallee interests inalienable without permission, tenants must keep down “vermin.” No alienation in fee simple. “Vermin Districts,” committees, rates. Limited right of selection . . . . .	293
Other duties of Commissioner of Crown Lands and Survey . . . . .	296
Public Parks, etc. . . . .	296
The Land Tax . . . . .	297
<i>The Commissioner of Public Works</i> . . . . .	297
<i>The Commissioner of Trade and Customs</i> . . . . .	297
<i>The Minister of Public Instruction</i> . . . . .	297
Education in state schools . . . . .	297
Free, secular, and compulsory . . . . .	297
School Districts . . . . .	298
Boards of Advice . . . . .	298
Appointment of teachers . . . . .	299

## CONTENTS

	XXXV
	PAGE
Committee of Classifiers . . . . .	299
Classified Roll . . . . .	299
Promotion and transfer . . . . .	299
<i>The Minister of Defence</i> . . . . .	300
The Council of Defence . . . . .	300
The permanent forces of the colony . . . . .	300
The Australasian Naval Force' . . . . .	301
Volunteer Forces of the colony . . . . .	301
<i>The Solicitor-General and Minister of Justice</i> . . . . .	302
<i>The Minister of Railways</i> . . . . .	302
The Victorian Railway Commissioners . . . . .	303
The standing committee on Railways . . . . .	303
<i>Other Responsible Ministers</i> . . . . .	304

## CHAPTER XXXII

### THE POLICE FORCE

The Chief Commissioner of Police . . . . .	305
Officers appointed by Governor in Council . . . . .	305
Constables by the Chief Commissioner . . . . .	305
Oath of service . . . . .	305
Special duties of members of the Force . . . . .	305
Superannuations and pensions . . . . .	306
Superannuation Fund and Board . . . . .	306
Special tribunal for members of the force . . . . .	306
Special protection to constables acting under magistrate's warrant . . . . .	306

## CHAPTER XXXIII

### OTHER PUBLIC OFFICIALS

The Public Service Act . . . . .	307
The Public Service Board . . . . .	308
Its composition and duties . . . . .	308
Divisions of the Public Service—"First," "Professional," "Clerical," and "Non-Clerical" . . . . .	309
Appointments, promotions, and transfers . . . . .	309
Compulsory insurance and retirement . . . . .	310
Dismissal and reduction . . . . .	311
Vacations and furlough . . . . .	311

## CHAPTER XXXIV

## THE LEGAL POSITION OF THE EXECUTIVE IN VICTORIA

	PAGE
English principles respecting the position of the Executive . . . . .	313
Non-imputability of the occupant of the throne . . . . .	313
Legal authority required for every act of the executive . . . . .	313
Legal responsibility of officials . . . . .	314
Illegal order of superior no excuse for subordinate . . . . .	314
Special machinery for the enforcement of Crown claims . . . . .	314
Application of these principles in Victoria . . . . .	314
Separate origin of legislature and executive . . . . .	314
Method of creating the executive . . . . .	315
The Governor's Commission defines the limits of his authority . . . . .	315
Part of this authority is to appoint officials . . . . .	315
This part also regulated by statute . . . . .	315
Deductions from these premises . . . . .	315
Application to Victoria . . . . .	316

## 3. JUDICIARY

## CHAPTER XXXV

## THE SUPREME COURT

Increase in number of judges of the Supreme Court . . . . .	318
Terms of office . . . . .	318
Capacities of the Court . . . . .	319
The Full Court . . . . .	319
Ordinary Courts of First Instance . . . . .	319
The Council of Judges . . . . .	320
The Court in its legislative capacity . . . . .	320
Outline of procedure . . . . .	320

## CHAPTER XXXVI

## OTHER CENTRAL COURTS

The Court of Insolvency . . . . .	322
The "judge" of the Court of Insolvency . . . . .	322
Appeals to the Supreme Court . . . . .	322
Process in bankruptcy . . . . .	322
Liquidation by arrangement and composition . . . . .	323
The Vice-Admiralty Court . . . . .	324

# CONTENTS

xxxvii

	PAGE
Registrar or Marshal . . . . .	323
Deputies . . . . .	323
Jurisdiction of the court . . . . .	323
Appeal to the Privy Council . . . . .	324

## B. LOCAL GOVERNMENT

### 1. LEGISLATURE

#### CHAPTER XXXVII

##### MUNICIPAL COUNCILS

No real local government in Victoria . . . . .	325
Various local units . . . . .	326
History of local government from 1855 . . . . .	326
Fifty-six municipal districts in 1860 . . . . .	326
The Act of 1863 ("boroughs") . . . . .	326
The Act of 1869 ("boroughs") . . . . .	327
Second Act of 1863 ("District Boards and Ratepayers").	327
"Shires" . . . . .	328
106 shires or road districts in 1869 . . . . .	328
The Shires Statute of 1869 . . . . .	328
The consolidating Act of 1874 . . . . .	329
Boroughs, towns, and cities . . . . .	329
Shires . . . . .	329
Municipal councils . . . . .	330
Number and qualification of councillors . . . . .	330
Disqualifications for membership . . . . .	330
Annual retirement of one-third of council . . . . .	330
Extraordinary vacancies . . . . .	331
Municipal franchise . . . . .	331
Municipal Roll . . . . .	331
Revision Courts . . . . .	331
Process of election . . . . .	332
Deposit required . . . . .	332
Poll. Ballot . . . . .	332
Decision of disputed elections . . . . .	333
Methods of Council's action . . . . .	333
Annual and ordinary meetings . . . . .	333
Proceedings at meetings . . . . .	333
"Special meetings" and "special orders" . . . . .	333
Municipal offices . . . . .	334
Legislation of a municipal council . . . . .	334
By-laws, Regulations, and Joint-Regulations . . . . .	334



	PAGE
Method of enacting . . . . .	334
Conditions of the legality of municipal legislation . . . . .	335
Scope of municipal legislation. Direct and indirect . . . . .	335
Enforcement and proof of municipal legislation . . . . .	337

## CHAPTER XXXVIII

## MINING DISTRICT BOARDS

Decline in importance of mining . . . . .	338
Dual aspect of the question . . . . .	338
Mining Districts . . . . .	339
At present seven. Divisions . . . . .	339
Mining District Boards . . . . .	339
Qualifications of members and electors . . . . .	339
Vacation of membership . . . . .	339
Meetings of the Board. Chairman . . . . .	340
Legislative powers of Board . . . . .	340

## 2. EXECUTIVE

## CHAPTER XXXIX

## MUNICIPAL AND MINING OFFICIALS

Much executive work performed by the Council itself . . . . .	341
Chairman of the Council ("Mayor" "President") . . . . .	341
The Treasurer . . . . .	342
The revenue of a municipality . . . . .	342
Rates . . . . .	342
"General" . . . . .	342
"Separate" . . . . .	343
"Extra" . . . . .	343
Notice of intention to levy . . . . .	343
Appeal to General Sessions . . . . .	343
Enforcement of rates . . . . .	343
Endowment . . . . .	344
Loans. Debentures . . . . .	344
Notice of intention to raise . . . . .	344
Referendum if demanded by twenty ratepayers . . . . .	344
Sinking fund . . . . .	345
Expenditure of revenue . . . . .	345
Municipal clerk ("Town clerk," "Shire Secretary") . . . . .	345

## CONTENTS

xxxix

	PAGE
Municipal surveyor . . . . .	346
Auditors, elected . . . . .	346
Publication of municipal accounts . . . . .	346
"Special audit" . . . . .	346
Mining officials . . . . .	347
The Warden . . . . .	347
Executive and judicial capacity . . . . .	347
Warden's clerk . . . . .	348
The Registrar . . . . .	348
The Surveyor . . . . .	348
The Inspector . . . . .	348
The Board may also appoint officials . . . . .	348

### 3. JUDICIARY

#### CHAPTER XL

##### COUNTY COURTS

Courts of Requests abolished . . . . .	349
County Courts really local, though nominally universal . . . . .	349
Appointment of judges. Their jurisdiction not confined to particular courts . . . . .	350
Registrars and Assistant-Registrars . . . . .	350
Bailiffs . . . . .	350
Special protection to persons acting under the County Court Act . . . . .	350
Jurisdiction of County Courts . . . . .	351
Transfers from and to Supreme Court . . . . .	351
Enforcement of County Court judgments . . . . .	351
Appeal to Supreme Court . . . . .	352
Extension of County Court judgments from other colonies . . . . .	352

#### CHAPTER XLI

##### MAGISTRATES' COURTS

All magistrates are "justices" . . . . .	353
Ancient character of the office . . . . .	353
Always Crown appointment . . . . .	353
And, for a long period, honorary . . . . .	353
Justices in Victoria—specially appointed . . . . .	353
<i>Ex-officio</i> , perpetual and temporary . . . . .	354
Three capacities of a justice . . . . .	354



	PAGE
Out of sessions . . . . .	354
Preliminary hearing of charges . . . . .	354
Examination of witnesses and committal for trial . . . . .	355
Binding over of witnesses . . . . .	355
Administrative powers of justices out of sessions . . . . .	355
In Petty Sessions . . . . .	356
Police Magistrates . . . . .	356
Jurisdiction of Petty Sessions . . . . .	356
Procedure . . . . .	357
Enforcement of orders . . . . .	357
Appeal in certain cases to General Sessions . . . . .	357
Case may be stated for opinion of Supreme Court . . . . .	357
Power of Supreme Court to quash proceedings . . . . .	357
In General Sessions . . . . .	357
Clerk of the Peace . . . . .	357
Chairman of General Sessions . . . . .	358
Civil and criminal jurisdiction of General Sessions . . . . .	358
Special protection to magistrates and their officials . . . . .	358

## CHAPTER XLII

## COURTS OF MINES

Holding of Courts of Mines . . . . .	360
Judges of County Courts <i>ex-officio</i> judges of Courts of Mines . . . . .	360
Clerks of the Courts . . . . .	360
Bailiffs . . . . .	360
Special protection of clerks and bailiffs . . . . .	360
Jurisdiction of Court of Mines . . . . .	360
As a Court of First Instance . . . . .	361
As a Court of Appeal . . . . .	361
Enforcement of decrees . . . . .	361
Appeal to the Supreme Court . . . . .	361

## CHAPTER XLIII

ON THE LEGAL RELATIONS BETWEEN THE CENTRAL AND LOCAL  
GOVERNMENTS

Overwhelming importance of central government in Victoria . . . . .	363
Control over local legislation . . . . .	363
Over appointment of officials . . . . .	364
Over distribution of public funds . . . . .	365

CHAPTER XLIV

ATTEMPTS TOWARDS A FEDERAL UNION

	PAGE
Attempt at federal executive in 1851 . . . . .	366
The Committee of 1857 . . . . .	366
Attempts in England . . . . .	367
Report of Committee adopted . . . . .	367
Creation of new colony of Queensland . . . . .	367
General acceptance of project of a conference . . . . .	367
Committee of 1870 . . . . .	367
Royal Commission and Report . . . . .	367
Conference at Melbourne in 1880 . . . . .	368
Adjournment to Sydney. Results of the conference . . . . .	368
The Sydney convention of 1883 . . . . .	368
The Federal Council Act . . . . .	369
Analysis of the measure . . . . .	369
Legislation of the Federal Council . . . . .	370
Assent to and disallowance of measures . . . . .	370
Force of the federal legislation . . . . .	370
Representations of the Council . . . . .	370
Adoption of the Federal Council Act in Victoria . . . . .	371
History of the Council . . . . .	371
Additional matters referred by Victoria in 1889 . . . . .	371
Imperfection of the Federal Council scheme . . . . .	372
Federal Conference at Melbourne in 1890 . . . . .	372
Difficulty and novelty of the scheme . . . . .	372

CHAPTER XLV

CONCLUSION

Reason for the adoption of the Cabinet system in Victoria . . . . .	375
Peculiarity of that system . . . . .	375
Origin of the system in England . . . . .	376
Three essential conditions . . . . .	376
Cohesion . . . . .	376
Parties . . . . .	377
Tradition . . . . .	377
Are these conditions existent in Victoria? . . . . .	378
There is little cohesion . . . . .	378

	PAGE
There are no political parties proper . . . . .	378
Because no political questions . . . . .	379
Why the great question of Capital against Labour cannot be made a party question at present . . . . .	379
The force of tradition has been weakened . . . . .	380
Probable rival in local government . . . . .	381
Early weakness of local government in Victoria . . . . .	381
Likelihood of change . . . . .	383
Its probable effect on the Cabinet system . . . . .	384

## APPENDIX A

Specimen Minute of the Executive Council of N. S. W. in 1837 .	385
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## APPENDIX B

Specimen Minute of the Executive Council of Victoria in 1855 .	386
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## APPENDIX C

Statistical Summary of Victoria at the close of the respective periods	388
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## APPENDIX D

The National Convention of 1891 . . . . .	389
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## PRINCIPAL ABBREVIATIONS

G. G.	=	"Government Gazette."
L. A.	=	"Legislative Assembly."
L. C.	=	"Legislative Council."
N. S. W.	=	"New South Wales."
P. P.	=	"Port Phillip."
V.	=	"Victoria," or "Victorian."
V. and P.	=	"Votes and Proceedings" ( <i>i.e.</i> the official minutes).

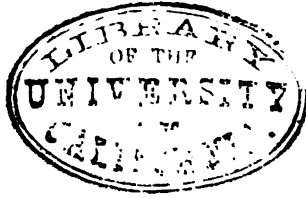
[*N.B.* In the legislation of New South Wales and Victoria, each enactment is deemed a separate statute, not, as in English legislation, a chapter of the statute of the session. A Colonial Act cannot, therefore, fall in two regnal years. It is thus, in most cases, easy to distinguish at once between the quotation of an English and that of a Colonial Act. The former would run thus (*e.g.*)

18 & 19 Vic. c. 55,

the latter thus

19 Vic. No. 6.

From the first session of the Parliament of Victoria (1856-7) the Acts are numbered consecutively, instead of being started afresh each year, and are often quoted by the number only. In these pages, however, the regnal year is generally prefixed, as a ready guide to the date of the enactment.]



## CHAPTER I

### THE HOME GOVERNMENT OF THE COLONIES PRIOR TO 1835

THE ancient theory of government in England was that every act of state—legislative, executive, and judicial—was performed by and in the name of the Crown. The theory still holds, though it has received in the course of centuries a most important addition—that the Crown must itself act, in almost every case, through its appropriate agents, who, as a matter of fact, have practically suggested the act in question. And in tracing the origin of a department of state, the old theory is still our safest guide. If we go back far enough, we shall find surely that the root of the matter is to be found in the autocratic power of the Crown. As time goes on, and business increases, the Crown entrusts the matter to a special body of advisers, always in theory the servants of the Crown, and often very powerfully influenced by the Crown's personal views, but gradually acquiring an independent position. Still later, this body of advisers passes by degrees under the control of Parliament, though nominally remaining in the service of the Crown. Such is the general course of the history of English government, and it is especially the course of the history of English colonial government.

The earliest foreign possessions of the English Crown were foreign in every sense. They consisted of certain fiefs of the decaying Roman Empire, which, by dynastic arrangements, or by conquest, became vested in English kings. Their inhabitants were strangers to the English, and, with rare exceptions, such as that of Calais, they never formed part of the ordinary English system of government. Long after the Parliament of England had become an important factor in home affairs it

abstained from any share in the government of foreign dependencies. It regarded them with dislike as sources of war and expense. They were left entirely, as a royal appanage, to the personal government of the Crown, through its personally chosen agents.

Even when the founding of true colonies began, Parliament claimed no share in their management. Virginia, the oldest of the American group, was organised by letters-patent from the Crown. Maryland and Pennsylvania were actually granted in fee to private individuals. Crown-charters, not Acts of Parliament, were the bases of such powers of self-government as the old English-speaking colonies possessed.<sup>1</sup> The dependencies acquired by conquest were managed as Crown estates.

The first body to acquire a constitutional position with regard to foreign possessions was the Privy Council. In the time of the Commonwealth, a period which is in truth the seedplot of modern politics, we find the Protector, whose generals had been fighting the Spaniard for the empire of the Southern Seas, appointing a committee "to take into consideration the Trade and Navigation of this Commonwealth."<sup>2</sup> We are not told of what body this was a committee, but as no Parliament was in existence at the time of its appointment (2d November 1655), and as the letter of summons says that the appointment is made by His Highness with the advice of his *Council*, there can be little doubt that it was regarded as a committee of the latter body, and as a matter of fact we learn from another source<sup>3</sup> that its officials were paid by the Council.

The inclusion of the subject of *Navigation* in its commission would undoubtedly have given the committee power to deal with the English dependencies abroad. But unfortunately the statesmen of the Commonwealth were too busy to develop the idea; and, though additions to its membership were occasionally made,<sup>4</sup> we learn from anonymous but fairly reliable

<sup>1</sup> Cf. a list of the settlements which received charters from the Crown between 1574 and 1660 in *Calendar of State Papers* (colonial), p. viii. The whole of the preface to this volume is well worth reading by those interested in the history of the English colonies.

<sup>2</sup> Whitelock, *Memorials* (edition 1782), p. 630.

<sup>3</sup> *Privy Seal Book*, 1656, p. 56 (quoted in Thomas's *Notes of Materials for the History of Public Departments*, p. 77).

<sup>4</sup> *E.g.* Whitelock, p. 634 (February 1655-56).

testimony, that the committee soon became "merely nominal."<sup>1</sup> The plan did not, however, entirely drop out of sight, for, immediately after the Restoration, Charles II. created by patent two bodies specially concerned with the administration of dependencies. The first, known as the *Council of Trade*, constituted by patent dated 7th November 1660,<sup>2</sup> was charged by Article XI. of its instructions to consider the general state of the Foreign Plantations, and in all matters wherein these were concerned to take advice "from the Council appointed to sit apart for the most particular inspection, regulation, and care of the Foreign Plantations."<sup>3</sup> This was the second body, the *Council of Foreign Plantations*, constituted by patent dated 1st December 1660,<sup>4</sup> and its Articles of Instruction show clearly that it is the direct ancestor of the Colonial Office of the present day. Its members are to establish a regular correspondence with the Governors of the various dependencies, to require them to send an account of their affairs and the constitution of their laws and government, to hear and report to the king upon all complaints, to investigate the subject of *emigration*, "and how noxious and unprofitable persons may be transplanted to the general advantage of the Public and commodity of our Foreign Plantations," and, in a word, "to advise, order, settle, and dispose of all matters relating to the good government . . . of the Foreign Plantations."<sup>5</sup>

These two bodies were consolidated by royal patent of the 27th September 1672<sup>6</sup> into *The Council of Trade and Plantations*, with salaried president and vice-president, but the united Board was itself abolished by a revoking patent of the 21st December 1675.<sup>7</sup> There can be little doubt that, while they existed, these councils were looked upon as committees of the Privy Council, for, by their Articles, the members of the Council of Foreign Plantations are directed, when they deem further powers necessary, to address themselves to the king or *Privy Council* for further directions;<sup>8</sup> and, in the patent revoking their commission, the joint council are ordered to deliver up their papers to the Clerk of the Privy Council.<sup>9</sup>

The Board of Trade and Plantations was revived by King

<sup>1</sup> Thomas, p. 77.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Articles quoted in Thomas, p. 34.

<sup>5</sup> *Ibid.* p. 78.

<sup>7</sup> *Ibid.* p. 79.

<sup>8</sup> Thomas, p. 34 (Article XI.)

<sup>9</sup> *Ibid.*



William III. on the 16th December 1695. The powers given to the commissioners specially refer to the "Plantations in America and elsewhere," and include, in addition to the functions of the joint board of Charles II., the important right to recommend to the King in Council the names of persons to be appointed Governors and officials, and also the duty of considering the Acts of the Assemblies of the Plantations sent to England for the royal approval.<sup>1</sup>

This board was continued, under various commissions, till the year 1781, when, at the close of the American War of Independence, the Board of Trade and Plantations was abolished by statute,<sup>2</sup> and it was provided<sup>3</sup> that the functions of the commissioners might be exercised by any committee or committees of the Privy Council, appointed by His Majesty during pleasure, without salary, fee, or pension to the members thereof. A feeling of despair, occasioned by the loss of the American colonies, and a desire for economic reform, combined to prevent the latter provision being properly carried out till the year 1786, when an Order in Council constituted a regular establishment of eighteen officials, charged with attending to the business of the committees contemplated by the Act of 1782.<sup>4</sup> In the year 1817 the Crown was authorised by statute<sup>5</sup> to pay a salary not exceeding £2000 a year to the Vice-President of the Committee of the Council appointed for the consideration of matters relating to Trade and Foreign Plantations; and in the year 1827 a similar provision was made with regard to the Presidency,<sup>6</sup> which, it was specially enacted, should not on that account be deemed a "new office."<sup>7</sup> (The President and Vice-President were, in fact, with the exception of the Colonial Secretary, the only working members of the committee.)

The establishment thus created, familiarly known as "The Board of Trade," continued in existence down to the time of the foundation of Port Phillip. But it was by no means the sole, or even the most important provision made by the English government for the management of the colonies. We have not yet seen how it was that *Parliament* came to have a voice in

<sup>1</sup> Thomas, p. 79 (Article XI.)

<sup>2</sup> 22 Geo. III. c. 82.

<sup>3</sup> § 15.

<sup>4</sup> Thomas, p. 79.

<sup>5</sup> 57 Geo. III. c. 66.

<sup>6</sup> 7 Geo. IV. c. 32.

<sup>7</sup> This was to avoid the operation of the restrictions of the 6 Anne, c. 7, §§ 25 and 26 (which see).

the matter, for the Privy Council is a body which, in theory, is quite independent of Parliament, and its committees are not, nominally, under Parliamentary control. To understand how Parliament acquired the control of the colonial government, we must consider for a moment the history of the office of Secretary of State for the Colonies.

From very early times there had been in England officials known as "King's Secretaries." As their name implies, they were officials attached to the person of the monarch, to conduct his correspondence and act as his messengers. For centuries their appointments were purely casual, they had no definite position in the state, and their numbers varied with the actual requirements of the day. But with the reign of Henry VIII. they began to acquire a distinct standing. Their official rank was fixed by the Statute of Precedence of 1540.<sup>1</sup> From that time until the year 1708 the regular number of Secretaries was two, known respectively as the "First" and "Second," or the "Northern" and "Southern," and this tradition was rarely departed from.<sup>2</sup> The warrant of Henry VIII. (said to be of date 1539 or 1540),<sup>3</sup> which appointed Thomas Wriothesly and Ralph Sadler to "have the name and office of the Kinges Majesties Principal Secretaries," ordained that they should attend His Majesty whenever he was present in the "Hiegh House" of Parliament, and that at other times they should sit alternately by weeks in the "Hiegh" House and the "Lowe" House, except that when special business should be treated in the latter, they might both be present.<sup>4</sup> The warrant also obviously contemplates the presence of the secretaries, though in a subordinate condition, in all meetings of the *Council*,<sup>5</sup> and we therefore glean from it this most important fact, that in the sixteenth century the king's secretaries did actually constitute a link between the Council and the Parliament, the respective depositories of prerogative and popular power.

The office gained further recognition by the practice, which began in 1558,<sup>6</sup> of creating it by patent, instead of by mere

<sup>1</sup> 31 Hen. VIII. c. 10.

<sup>2</sup> Thomas, p. 27.

<sup>3</sup> *State Paper Commission*, vol. i. p. 623 n.

<sup>4</sup> *Ibid.* p. 624. But they had no votes unless they happened to be peers (31 Hen. VIII. c. 10, § 8).

<sup>5</sup> *Ibid.* p. 623. The 31 Hen. VIII. c. 10, § 10, expressly gave them seats.

<sup>6</sup> Thomas, p. 27.

warrant or delivery of the seals, and from the beginning of the seventeenth century its holders are spoken of as *Secretaries of State*.<sup>1</sup> Their position was still further strengthened by Clarendon's scheme of government at the time of the Restoration, one of its rules being that the Principal Secretaries of State *should be of all Committees of the Council*.<sup>2</sup>

It is doubtful, however, whether a Secretary of State at this time retained the right to sit, *ex officio*, in Parliament. Like the Lord Chancellor before him, a Secretary of State had ceased to be the personal attendant of the king; he had developed into a great public official. After the Restoration, the office was frequently held by men of first-rate importance in politics, men like Arlington, Sunderland, and Godolphin, who were generally members of one House of Parliament; and this practice led easily, after the Revolution, into the maxim that a Secretary of State *ought* to be a member of Parliament.

The custom of having two Principal Secretaries of State continued practically unbroken till the year 1768. Sixty years before that date, Queen Anne, in 1708, had appointed a Third Secretary, for Scottish affairs, and the appointment was continued till the Jacobite rising in 1745,<sup>3</sup> but the Third Secretary was not necessarily of Cabinet rank, and did not take an equal position with his older colleagues. Walpole was also made Secretary *at War* in 1708, and the office was continued intermittently for some time, but it was not a Secretaryship of State, and must not be confounded with the later Secretaryship *for War*.

In 1768 a really new departure was taken by the appointment of the Earl of Hillsborough as Secretary of State for the Colonies. The patent of appointment (dated 27th February 1768) distinctly states that "the public business of the Colonies and Plantations increasing, it is expedient to appoint one other Principal Secretary of State besides the two ancient Principal Secretaries."<sup>4</sup>

Here, then, we get a clear recognition of the colonies as a department of state, with a special official to look after it. The holder of the office, if a member of the House of Commons,

<sup>1</sup> The first instance is said to have been in 1601 (Thomas, p. 27). I have not been able to trace the reference in Rymer, but find instances in 1610, 1616, and 1617 (Rymer, *Fœdera*, vii. 2, pp. 169 and 210, and vii. 3, p. 4).

<sup>2</sup> Thomas, p. 23.

<sup>3</sup> *Ibid.* p. 27.

<sup>4</sup> Quoted in Thomas, p. 27.

would require to be re-elected under the provisions of the Act of 1708,<sup>1</sup> but he would escape the exclusion of the Place Act of 1742,<sup>2</sup> and so the practice of Parliamentary control could be extended to the Colonial Office. Unfortunately, the creation of the department was soon followed by the loss of the American colonies, and in 1781<sup>3</sup> the office of Third Secretary, or Secretary of State for the Colonies, was, with the Council of Trade and Plantations itself, swept away. Such colonial business as remained was transferred to the "Home" office,<sup>4</sup> which, with the "Foreign" office, by a new arrangement made in 1782,<sup>5</sup> replaced the former Northern and Southern departments. For some time the personality of the old Colonial Department survived in the separate staff of the "Office for Plantations," which existed inside the Home Office, but even this distinction had disappeared before 1795.<sup>6</sup> Until the year 1801 the business of the colonies continued to be transacted in the Home Office.<sup>7</sup>

But in that year another change was made. The necessities of the great French war had led to the establishment, on the 11th July 1794,<sup>8</sup> of a permanent War Department, presided over by a Secretary of State, and in 1801 the business of the colonies was transferred to this new department, the head whereof was thenceforward known as the "Secretary for War and the Colonies." This arrangement continued till some years after the founding of Port Phillip, and fixed the number of Secretaries of State at three. But, still, it must be remembered that the position of a Secretary of State is functional only, not organic. There is no law which compels Her Majesty to appoint any particular number, and the division of business can be varied at any time, while each Secretary can act for any other in all matters properly cognisable by a Secretary of State. It must be borne in mind also, that the other secretaryships referred to at this period of history, the Secretaryship *at War* held by Lord Palmerston in 1812 and 1827, and the Chief Secretaryship for Ireland created at the time of the Union, are not Principal Secretaryships of State at all.<sup>9</sup> It is still more important to remember that, during the present century, the

<sup>1</sup> 6 Anne, c. 7, § 26.<sup>2</sup> 15 Geo. II. c. 22.<sup>3</sup> By 22 Geo. III. c. 82.<sup>4</sup> Thomas, p. 35.<sup>5</sup> *Ibid.* p. 28.<sup>6</sup> *Ibid.* p. 35.<sup>7</sup> *Ibid.*<sup>8</sup> *Ibid.*<sup>9</sup> Strictly speaking, the Home Secretary is to this day responsible for the affairs of Ireland, the Chief Secretary being his official subordinate.

Secretary for the Colonies has invariably been a member of Parliament, and nearly always in the Cabinet. This practice it is which has enabled Parliament, by means of questions asked of the Colonial Secretary or Under-Secretary,<sup>1</sup> to take part in the actual administration of the colonies. The right of Parliament to legislate for the colonies was formally claimed in 1766,<sup>2</sup> and has often been exercised.

We have now traced the growth of the two principles which, at the founding of Port Phillip, determined the form of the constitutional relations of the English government with the colonies. We may close the chapter with a quotation, which illustrates the working at that time of the two principles, the principle that the colonies are governed by the Crown, and the principle that that government must be conducted in accordance with the views of Parliament. The extract relates specially to colonial legislation, but it may serve as an illustration for general colonial business.

"All Acts passed by Colonies having Legislative Governments are transmitted to the Secretary of State to be laid before Her Majesty. These Acts are forwarded by the Secretary of State to the Clerk of the Privy Council, and are thus submitted to Her Majesty, who thereupon orders a reference to be made to the Board of Trade. The Secretary of State, being himself a member of the Board, communicates with the President by means of minutes, pointing out in the first instance the Acts which appear to him to require the peculiar attention of the Board, or which should be referred for the opinion of any other Department of the Government (most frequently the Treasury). Those Acts which do not appear to him to fall within the peculiar province of the Board of Trade are recommended to be confirmed, disallowed, or left to their operation, as the case may require, which recommendation is, as a matter of course, complied with; but all the Acts of this class of Colonies must receive the formal sanction of the Board of Trade before being assented to by the Crown.<sup>3</sup>

That is to say, a colonial question came in the first place before the Secretary for the Colonies, who was nominally a servant of the Crown, but really a great parliamentary official with a seat in the Cabinet. By him it was laid before his

<sup>1</sup> When the Colonial Secretary is a peer, the Under-Secretary is always chosen from the House of Commons, and conversely. So there is always some one to be questioned.

<sup>2</sup> By the 6 Geo. III. c. 12. The Act expressly mentions only the American colonies, but there is no doubt that the claim was meant to be general. The Act has never been repealed.

<sup>3</sup> Thomas, p. 81.

principal, the Crown, which referred it to its regularly appointed advisers on such subjects, the Committee of the Council for Trade and Plantations, or, as they were usually called, the Board of Trade, who finally advised the Crown as to its course of action. But, ever since the days of Huskisson's fiscal reforms, the President of the Board of Trade had also been a Cabinet Minister, responsible to Parliament. And so ultimately Parliament controlled the whole matter. Such anomalies occur at every turn in the English constitution, and it is only by patiently unravelling their history that we can learn how the government of the empire has assumed its present character.

## CHAPTER II

### THE LOCAL<sup>1</sup> GOVERNMENT OF THE COLONIES (AND PARTICULARLY OF NEW SOUTH WALES) PRIOR TO THE YEAR 1835

As has been before said, such local constitutions as the earlier English-speaking colonies possessed were usually acquired by direct charter or proclamation of the Crown. The first important deviation from this rule was in the case of the colony of Quebec, which by statute of 1774<sup>2</sup> received an improved form of local government. The precedent was followed, in the year 1791, by Mr. Pitt's famous Canada Act,<sup>3</sup> which united the two provinces of Quebec and Ontario. It has been declared by high authority<sup>4</sup> that the reason for the introduction of Parliamentary action into the government of Canada was the desire to concede to the Roman Catholic colonists certain rights inconsistent with the severe Conformity statutes then existing, and with which the Crown had no power to dispense.<sup>5</sup> But the application of the principle about the same time to the government of India, and, soon after, to Australian affairs, makes it more probable that the change was really due to the growing extension of Parliamentary influence over all departments of state.

<sup>1</sup> The word "local" is used throughout this chapter to distinguish matters conducted in the colony from those conducted by the Home government.

<sup>2</sup> 14 Geo. III. c. 83.

<sup>3</sup> 31 Geo. III. c. 31. (These two statutes should be carefully studied, for they contain the modern policy of the English government with regard to colonial constitutions.)

<sup>4</sup> See *Report of the Committee of Her Majesty's Privy Council for Trade and Plantations* (4th April 1849), in *Victorian Votes and Proceedings*, 1849, pp. 702-712.

<sup>5</sup> This is a curious instance, if it be true, of deference to the teachings of history. James II. lost his crown by his exercise of the dispensing power. George III. would have been only too ready to enforce the existing legislation against the Catholics, if his ministers would have allowed him.

Be this as it may, the practice of the present century has been, whilst leaving to conquered acquisitions as much as possible their previous forms of government, to confer local constitutions by Act of Parliament upon possessions acquired by settlement. The course of proceeding has been fairly uniform. First, there has been a purely despotic government, when the colony has been ruled as a military position by a Governor and a handful of officials appointed by the Home government. Then there has been a constitution, with a Legislative Council, partly appointed by the Governor and partly elective. Of this Council the Crown officials have always formed part, but the executive has been unassailable by the legislature, and responsible only to the Colonial Office; possessions in these two stages being known technically as "Crown Colonies." In the third stage, there have generally been two Houses of Legislature, both elective, or one elective and one nominee, and the executive has consisted of officials chosen for their Parliamentary position, and liable to dismissal, like ministers in England, in consequence of an adverse vote of the legislature. This is the era of "Responsible Government."

Until the year 1823 the colony of New South Wales had been in the first, or military stage of government. The commission to its founder, Governor Phillip, practically vests despotic powers in his hands. There is no word of a local council, and the Governor has merely to take the oath to observe the laws relating to Trade and Plantations.<sup>1</sup> The civil and criminal courts established<sup>2</sup> under the 24 Geo. III. c. 56,<sup>3</sup> and the consequent Orders in Council,<sup>4</sup> make no provision for any popular element in the administration of justice.<sup>5</sup> Perhaps the most important check on the despotic power of the early Governors was the establishment, by Letters-Patent of 5th May 1787,<sup>6</sup> of a Vice-Admiralty Court, though, as the Governor was

<sup>1</sup> See copy of commission in Barton, *History of New South Wales*, i. p. 474. The accompanying instructions (23d April 1787) are mainly economic in character.

<sup>2</sup> By Letters-Patent of 2d April 1787 (Barton, i. p. 531).

<sup>3</sup> The Act legalising transportation.

<sup>4</sup> Of 6th December 1786 (fixing eastern coast of N. S. W. as place for reception of convicts).

<sup>5</sup> Unless, possibly, the presence of assessors appointed by the Governor may be regarded in that light.

<sup>6</sup> Copy in Barton, i. p. 537. It appears by a recital in the commission of Sir James Dowling as commissary of the court (Callaghan, *Acts and Ordinances*, ii. p. 1426), that there had been earlier Letters of the 12th April 1787.



himself senior member of the court, even this step left him with an overwhelming power. Not till the year 1823 was passed the first Constitutional Statute which operated in Australia. And even the 4 Geo. IV. c. 96 is not primarily concerned with government in the full sense of the term, but with the administration of justice, a matter which, as we have seen, had been dealt with for New South Wales so far back as 1785. It is interesting to note the order in which the functions of government develop. In Australia by far the earliest function was the administration of justice.

But the 4 Geo. IV. c. 96 marked a great advance. Not only was the old military court of 1787 to be entirely superseded by the erection of a Supreme Court and Court of Appeals somewhat on the English model,<sup>1</sup> but the Crown was empowered to create by warrant a Council, consisting of five, six, or seven persons, with considerable legislative power. The members of the Council were to hold their places entirely at the discretion of the Crown, and even a majority of them could not overrule the Governor in matters of legislation,<sup>2</sup> in which the Chief-Justice was also to have an independent position;<sup>3</sup> but still the statute marked a great advance on the old state of things. It is noteworthy that it specially required<sup>4</sup> that all laws and ordinances made under it in the colony, as well as the English Orders in Council issued in pursuance of it, should be laid before the English Parliament.

The 4 Geo. IV. c. 96 was carried into execution by Royal Charter, dated the 13th October 1823,<sup>5</sup> creating a Supreme Court of Justice, and by the appointment, under warrant of the 1st December 1823,<sup>6</sup> of five members of Council. These members were simply the five chief government officials—the Lieutenant-Governor, the Chief-Justice, the Colonial Secretary, the Principal Surgeon, and the Surveyor-General—and their official connection with the Council is proved by the fact that the warrant appointing them directs that in case any of them die before the warrant reaches the colony, their successors in office are to take their places in the Council. But Lord Bathurst's letter, which accompanied the warrant, explained

<sup>1</sup> 4 Geo. IV. c. 96, §§ 1-18.

<sup>2</sup> *Ibid.* § 24.

<sup>3</sup> *Ibid.* § 29.

<sup>4</sup> *Ibid.* § 31.

<sup>5</sup> Callaghan, ii. p. 1435.

<sup>6</sup> Copy in *Votes and Proceedings of Council* (N. S. W.), vol. i. p. 1.

that this policy was only to prevail until the English government had been made aware of the names of suitable local aspirants.<sup>1</sup> In pursuance of this pledge the Council was re-constituted by warrant of the 17th July 1825,<sup>2</sup> which appointed the full number of members, including amongst them the names of three private individuals.

But meanwhile a very important step had been taken. The 44th section of the Act of 1823<sup>3</sup> had empowered the Crown to constitute and erect the island of *Van Diemen's Land*<sup>4</sup> (which had formerly been part of the colony of New South Wales), "and any Islands, Territories, or Places thereto adjacent, into a separate Colony, independent of New South Wales." The Crown did not avail itself to the full of the powers of the section, but it made Van Diemen's Land a Lieutenant-Governorship under the Governor of New South Wales, whose somewhat peculiar relationship with the new Lieutenant-Governor of Van Diemen's Land was defined at length in Lord Bathurst's letter to Sir Thomas Brisbane of the 28th August 1823.<sup>5</sup> The importance of the step was twofold, for not only did it give the first form of separate existence to the present colony of Tasmania, but it practically deprived the settlers in Van Diemen's Land of the constitutional advantages granted by the 4 Geo. IV. c. 96 to the inhabitants of New South Wales.

The growing wealth and development of the Australian colonies after the Act of 1823 is marked by the fact that in the year 1827 the Home government ceased to provide funds for the carrying on of the civil governments of Australia,<sup>6</sup> leaving them to the support of the local treasuries; and in the year 1829 the 4 Geo. IV. c. 96, originally framed as a temporary statute, but prolonged by a continuing Act, was super-

<sup>1</sup> Letter in *Votes and Proceedings* (N. S. W.), vol. i. p. 1.

<sup>2</sup> Warrant, *ibid.* p. 20.

<sup>3</sup> 4 Geo. IV. c. 96.

<sup>4</sup> Norfolk Island had already been constituted a lieutenant-governorship by letters-patent of 28th January 1790 (*Barton*, i. p. 526). The Instructions of the lieutenant-governor were from Governor Phillip (*ibid.* p. 527).

<sup>5</sup> *Votes and Proceedings* (N. S. W.), vol. i. p. 12. There had practically been a separate local government before this date in Van Diemen's Land (cf. *Hobart Town Gazette* from 1820 onwards). A distinct Supreme Court was constituted for Van Diemen's Land by Letters-Patent in 1823 (cf. 9 Geo. IV. c. 83, § 2).

<sup>6</sup> Letter, dated 23d September 1834, from the Secretary of the Treasury to Sir George Grey. (Quoted in House of Commons Sessional Papers, 1840, vii. p. 559.)

seded by the important statute 9 Geo. IV. c. 83, the basis of constitutional rights in New South Wales at the time of the founding of Port Phillip.

The new statute, like its predecessor, was primarily concerned with the administration of justice. In the first place, the existing Supreme Court, or any new creation which might replace it, was to be a Court of Record,<sup>1</sup> and to have complete civil and criminal jurisdiction in New South Wales and its dependencies, with all the powers of the three common-law courts at Westminster; to be at all times a Court of Oyer and Terminer and Gaol Delivery<sup>2</sup> in and for New South Wales and its dependencies; to be a Court of Equity in the same places, with all the equitable and common-law jurisdiction of the Lord High Chancellor in England;<sup>3</sup> and to have such ecclesiastical jurisdiction as had been or should be given by the Letters-Patent of constitution.<sup>4</sup> The Crown was further empowered to institute circuit courts, to be served by judges of the Supreme Court, on the English model,<sup>5</sup> and to allow, under such regulations as it should think fit, an appeal from the decisions of the Supreme Court to His Majesty in Council.<sup>6</sup> Criminal issues were to be tried before a judge or judges of the Supreme Court, assisted by seven assessors chosen from commissioned officers of the army or navy,<sup>7</sup> and civil issues by a judge or judges with two magistrates acting as assessors;<sup>8</sup> but upon special authority by Order in Council the legislature of the colony was to be entitled to apply the jury system to any issues of fact permitted by the order.<sup>9</sup>

Provision was also made for the establishment of inferior tribunals by empowering the local legislature to institute courts of General and Quarter sessions, and to give them power to take cognisance in a summary way of all offences, not of a capital nature, committed by convicts, and of all matters cognisable by similar courts in England, subject, in the case of free offenders, to the rules laid down by the Act for the guidance of the Supreme Court.<sup>10</sup> A similar power was given to establish inferior courts of civil jurisdiction, to be known as "Courts of

<sup>1</sup> *I.e.* a court whose records are received in all proceedings, without further proof, as conclusive evidence of the truth of the statements they contain.

<sup>2</sup> For the exact meaning of these terms cf. Blackstone (ed. 1769), iv. pp. 266-8.

<sup>3</sup> 9 Geo. IV. c. 83, § 11.

<sup>4</sup> § 12.

<sup>5</sup> § 13.

<sup>6</sup> § 14.

<sup>7</sup> § 5.

<sup>8</sup> § 8.

<sup>9</sup> § 10.

<sup>10</sup> § 17.

Requests," presided over by "Commissioners" appointed by the Crown, with jurisdiction in cases of debt and damage up to the value of ten pounds.<sup>1</sup> Another most important section enacts "That all Laws and Statutes in force within the Realm of *England* at the Time of the passing of this Act (not being inconsistent herewith, or with any Charter or Letters-Patent or Order in Council which may be issued in pursuance hereof) shall be applied in the Administration of Justice in the courts of *New South Wales* and *Van Diemen's Land* respectively, so far as the same can be applied within the said Colonies," but in case of any doubt as to this applicability the colonial legislature is empowered to declare whether or not they do apply, or to establish any modification or limitation of them within the colony. This section, which is still in force, leaves the position of the colonial courts and legislatures, with regard to the laws of England existing before 25th July 1828,<sup>2</sup> extremely doubtful. Of course it is obvious that the colonial courts are bound to recognise any of such laws which are clearly unrepealed. It is equally plain that the colonial courts would be obliged to weigh any argument directed to show that an express or implied repeal or limitation by a colonial legislature was *ultra vires*. But it is submitted that no authoritative decision on the point could be pronounced by any court save the ultimate Court of Appeal, the Judicial Committee of the Privy Council. And it is clear that the 24th section of the Act of 1828 only intended to confer amending powers in cases of genuine doubt, whilst the actual enabling words both of that statute<sup>3</sup> and the previous statute of 1823<sup>4</sup> distinctly limit the legislative power of the Governor and Council to laws and ordinances *not repugnant to the Laws of England*. Nevertheless, the power of the colonial legislature to alter the English law for the colony appears to have been recognised by Lord Chelmsford in the case of *Rolfe v. Flower Salting Co.*,<sup>5</sup> decided in the year 1865, though the

<sup>1</sup> 9 Geo. IV. c. 83, § 18.

<sup>2</sup> § 24.

<sup>3</sup> It will be noticed that this section speaks expressly from the passing of the Act. The other provisions, generally speaking, date from the 1st March 1829 (§ 39).

<sup>4</sup> § 21.

<sup>5</sup> 4 Geo. IV. c. 96, § 24.

<sup>6</sup> L.R. 1, P.C. at p. 48. The colonial Act in question was the 5 Vic. No. 17 (N. S. W.) See also discussion of the same subject in Webb, *Imperial Law and Statutes*, pp. 61-68; also an elaborate early judgment on the same point in the case of *Macdonald v. Levy* (*Votes and Proceedings*, N. S. W., 1833, p. 175).

point was not actually necessary to the decision. Later Constitutional statutes have placed the matter on a different footing.

After making these elaborate provisions for the administration of justice, the 9 Geo. IV. c. 83 goes on to authorise the creation of a Legislative Council. Its members are to occupy their seats by the same tenure as before, but their numbers are increased to a minimum of ten and a maximum of fifteen.<sup>1</sup> The Council cannot act unless at least two-thirds of its members, exclusive of the chairman, are present.<sup>2</sup> All legislation (following strictly the English precedent) is to proceed in the Governor's name, but, except in cases of emergency, he is not to legislate until the proposed measure has been laid before the Council, and a disapproval thereof by the majority present at any meeting is to be fatal to the proposal, the objectors being, however, bound to state their reasons on the Council minutes. No law can be proposed by any one but the Governor, but he is likewise bound to record his reasons for refusing to introduce a particular measure. The Governor is also to preside at all meetings of the Council unless specially prevented.<sup>3</sup>

All laws and ordinances made by the Council are to be submitted at once to the Supreme Court, whose members may within fourteen days of their passing represent to the Governor that they are *ultra vires*, whereupon the Governor is to suspend their operation (which otherwise begins at the expiration of the fourteen days) until the representation has been brought before the Council. The Council may, if it pleases, overrule the remonstrance, but it must be transmitted by the Governor to the Home authorities.<sup>4</sup> Moreover, all colonial laws are to be so transmitted within six months of their passing, and may be disallowed by the Crown at any time within four years.<sup>5</sup> They are also to be laid at once before both Houses of the English Parliament.<sup>6</sup>

<sup>1</sup> 9 Geo. IV. c. 83, § 21.

<sup>2</sup> § 22. Such an essential proportion of a public body is usual spoken of, though somewhat inaccurately, as a "quorum." The word attained its present meaning from the old Latin forms of commissions to the justices of the peace in England. The commission would empower a certain number of them to hear certain cases, but specify names of some of the justices, the presence of one of whom should be necessary. So the wording would run: "With power for you, or any three of you, of whom (*quorum*) X to be one." There is an amusing reference to the practice in Sheridan's *Scheming Lieutenant*, Act II. Scene 4.

<sup>3</sup> § 23.

<sup>4</sup> § 22.

<sup>5</sup> § 28.

<sup>6</sup> § 29.

The actual extent of the legislative powers conferred on the council has been before alluded to. It is "to make Laws and Ordinances for the Peace, Welfare, and good Government of the said Colonies respectively,<sup>1</sup> such Laws and Ordinances not being repugnant to this Act, or to any Charter, or Letters-Patent, or Order in Council which may be issued in pursuance hereof, or to the Laws of *England*."<sup>2</sup> The power of imposing new taxation is also strictly limited to taxes required for local purposes,<sup>3</sup> but the power, already vested in the governor by previous statutes,<sup>4</sup> of levying certain customs and excise duties, is made exercisable for the future with the advice of the Council.<sup>5</sup>

These were the chief constitutional powers of the local government of New South Wales at the time of the founding of Port Phillip. It will be seen that, while they mark a distinct advance on the old constitution of 1823, inasmuch as the Governor can no longer overrule the majority of the Council in matters of legislation, they still fall far short of a true system of Parliamentary government. The members of the Legislative Council still hold their seats at the pleasure of the Crown, and the Council has absolutely no control over the executive, which is directly responsible to the Home authorities. Such criticism of the executive as appears upon the minutes of the Legislative Council is strictly limited to protests regarding the expenditure of the colonial revenue, in which matter the Legislative Council has a statutory position,<sup>6</sup> but even here the expenditure is finally subject to the control of the Commissioners of the English Treasury.<sup>7</sup>

The separation of the executive from the constitutional side of the government, and the fact that the records of the proceedings of the executive have not been published, render it somewhat difficult to give any account of its methods. But we gather from the official documents that at this period there was in New South Wales an official staff consisting of a Chief-Justice, an Archdeacon, a Colonial Secretary, an Attorney-General, a Collector of Customs, an Auditor-General, a Principal Surgeon,

<sup>1</sup> It must be remembered that the 4 Geo. IV. c. 96 was a constitutional statute also for Van Diemen's Land.

<sup>2</sup> § 21.

<sup>3</sup> § 25.

<sup>4</sup> 59 Geo. III. c. 114 ; 1 & 2 Geo. IV. c. 8 ; and 3 Geo. IV. c. 96. The latter statute empowers the governor to levy customs duties of 10s. a gallon on British and 15s. a gallon on foreign spirits, 4s. a pound on tobacco, and 15 per cent *ad valorem* on non-British manufactures imported direct from British ports.

<sup>5</sup> 9 Geo. IV. c. 83, § 27.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

and a Surveyor-General.<sup>1</sup> These officials were all appointed and paid by the Home government, and some of them at least met as an Executive Council under the directions by this time introduced into the Governor's Commission.<sup>2</sup> The Executive Council is, of course, the direct ancestor of the modern Colonial Cabinet, the legal title of which body is still The Executive Council. Occasionally non-official persons sat in the old Executive Council of New South Wales,<sup>3</sup> and the practice is still rarely followed. But primarily the Executive Council is a body of officials charged with the actual administration of the country, and meeting to discuss matters of common policy.<sup>4</sup> The titles of the offices which they hold usually explain their principal functions. The Colonial Secretary, or the "Chief" Secretary, as he is sometimes called, was the general political official; he was responsible for everything not specially allotted to another department. To the Surveyor-General fell the important task of extending the frontiers of the settled land of the colony, of superintending the making and repair of the roads, and of reporting upon applications for Crown grants. Some of the old offices are still in existence. The Chief-Justice and the Auditor-General<sup>5</sup> are no longer political officials, the dignitaries of the Church have ceased to be officials at all, the Principal Surgeon has naturally disappeared. The Collector of Customs and the Surveyor-General have become the Commissioner of Customs and the Minister or Commissioner of Crown

<sup>1</sup> The office of Lieutenant-Governor of New South Wales (as a permanent appointment) seems to have ceased with the separation of Van Diemen's Land in 1829. (Cf. *Minutes of the Council*, N. S. W., 1826-1830.)

<sup>2</sup> E.g. into that of Sir Richard Bourke, 25th June 1831. (Original in possession of government of New South Wales.)

<sup>3</sup> E.g. Colonel Lindesay, 1827-1831. He was an official, but not a *colonial* official. (Cf. *Votes and Proceedings*, N. S. W., 1831, p. 89.)

<sup>4</sup> It appears likely that at this period the Executive Council was rarely summoned, except on special occasions, such as the examination of Captain Robinson in the case of Sudds and Thompson, under General Darling in 1829. (Parl. Report, 1st Sept. 1835, evidence, p. 5.) Through the kindness of the Premier of New South Wales (Sir Henry Parkes), the author has been allowed to reproduce (see Appendix A) a page of the Minute-Book of the Executive Council for 1837. From this specimen it seems probable that at this time in ordinary cases the Governor issued his instructions, which were merely communicated to the officials concerned.

<sup>5</sup> The office of Auditor-General was abolished in Victoria under the 21 Vic. No. 24, following the provision of the Constitution Act (19 Vic.), and the position is filled by three non-political "Commissioners of Audit." (22 Vic. No. 86.)

Lands respectively.<sup>1</sup> The Colonial Secretary and the Attorney-General retain their old titles.<sup>2</sup> The exact position of these political officials at the present day is a matter of some difficulty, which will have to be considered. But there can be no doubt that, at the time of which we are speaking, they were simply paid administrative agents of the Crown, holding their posts on the same terms as the permanent officials in Downing Street or Somerset House. Some of them sat in the Legislative Council, and, doubtless, there expressed the Government policy; but as officials they were entirely unfettered by the views of the legislature.

Some considerable progress had been made in the development of the scheme of government contemplated by the Act of 1828 before the year 1835. There was a system of "common" and "special" juries for civil cases, and the principle of trial by jury had been slightly applied to criminal matters.<sup>3</sup> Courts of General Quarter-Sessions and Courts of Requests had been constituted.<sup>4</sup> Police courts and Courts of petty sessions had been organised,<sup>5</sup> and the fees chargeable in them regulated by statute.<sup>6</sup> The Customs had been placed on a regular and statutory footing.<sup>7</sup> But especially important in the early history of Port Phillip was the Act passed in the year 1833 "for protecting the Crown Lands of this Colony from Encroachment, Intrusion, and Trespass."<sup>8</sup> This Act, with its amendment of 1834,<sup>9</sup> authorised the appointment of "Commissioners of Crown Lands in the Colony of New South Wales," who should have power to take all necessary steps to protect the Crown Lands from trespass, and especially from trespass which might ultimately be used to ground a claim of title by occupation. These officials were invested with considerable authority, and were entitled to call on all justices of the peace and constables to aid them in the performance of their duty.

<sup>1</sup> The office of Surveyor-General has been reconstituted as a non-political office in Victoria.

<sup>2</sup> Perhaps one of the best ways of realising the extent of the executive machinery at this period is to glance through the estimates printed in the *Votes and Proceedings* of the Leg. Councils.

<sup>3</sup> 2 Will. IV. No. 3; and 4 Will. IV. No. 12 (N. S. W.)

<sup>4</sup> 3 Will. IV. Nos. 2 & 3 (N. S. W.)

<sup>5</sup> 4 Will. IV. No. 7; and 5 Will. IV. No. 22 (N. S. W.)

<sup>6</sup> 4 Will. IV. No. 5 (N. S. W.)

<sup>7</sup> 11 Geo. IV. No. 6 (N. S. W.)

<sup>8</sup> 4 Will. IV. No. 10 (N. S. W.)

<sup>9</sup> 5 Will. IV. No. 12 (N. S. W.)



It now only remains, to complete our view of the political horizon of Australia in 1835, to point out that the colony of Van Diemen's Land had been separated, for purposes of local government, from the colony of New South Wales, by royal warrant under the 44th section of the Act of 1823;<sup>1</sup> that the "province" of South Australia was just being organised on the most approved principles under the English Act 4 & 5 Will. IV. c. 95;<sup>2</sup> and that the Swan River settlement (afterwards known as "Western Australia") had been begun by Captain Stirling under Colonial office Regulations in the year 1829, and was now suffering from the untoward circumstances of its early history. Queensland had, at the time, no separate existence, but was the Moreton Bay District of New South Wales. New Zealand was a subordinate settlement, barely organised, under the control of the Governor at Sydney.

<sup>1</sup> 4 Geo. IV. c. 96.

<sup>2</sup> See, for full account, Sessional Papers (House of Lords), 1841, vol. iv.

**PART I**  
**MAGISTERIAL GOVERNMENT**



## CHAPTER III

### THE FOUNDING OF PORT PHILLIP

FOR purposes of constitutional law, the history of Victoria begins with the settlement of the Port Phillip Association in the year 1835. There had been earlier attempts at colonisation, but they had not led to any general results. The best known of them are the settlement under Captain Collins at Sullivan's Bay in 1803, abandoned almost immediately, the settlement at Western Port in 1824, which only lasted till 1827, and the settlement of the Hentys at Portland Bay in 1834, ultimately merged in the fortunes of the Port Phillip colony.

The Port Phillip Association was simply the commercial venture of a few men living at Launceston, a port on the northern coast of Van Diemen's Land, the nearest, or almost the nearest, coast to Port Phillip Bay. At the time when their agent first landed at Port Phillip, and obtained by two so-called deeds of feoffment the grant of about 150,000 acres of land from the aboriginals, there appears to have been no formal arrangement between the members of the Association;<sup>1</sup> but, shortly after Mr. Batman's return from his expedition, a provisional deed of partnership was entered into by the fifteen members.<sup>2</sup> This deed not only makes no attempt to provide any system of government for the new territory, but it carefully excludes, so far as it can, even the notion of an ordinary partnership. Therefore, as the schemes of the Association soon collapsed, it is not worth while to analyse the contents of this deed of partnership. It has had no influence upon the form of government in Victoria.

<sup>1</sup> Bonwick, *Port Phillip Settlement*, p. 357.

<sup>2</sup> Copy in Bonwick, p. 365.

For a very important though very easily settled question of constitutional law presented itself at the outset. What was the legal position of the so-called grantees of land at Geelong and Dutigalla?

Their own first view obviously was that they were entitled by virtue of the grant from the savages. This is put beyond question by their letter to the Secretary of State for War and the Colonies dated the 27th June 1835,<sup>1</sup> in which they say: "We might therefore have contented ourselves with this treaty with the aboriginal tribes, and quietly have taken possession of the land without any official notice, either to the British or Colonial governments." And they emphasise the view that the real sovereignty in the soil is vested in the aboriginals, by pointing out that they have agreed to pay a perpetual tribute to them, which will be lost if the government do not advise the Crown to "relinquish any legal or constructive right to the land in question."

It is possible that the writers of this letter did not quite consider the legitimate consequences of their argument. In all probability they did not mean seriously to deny the authority of the English Crown in the new territory, nor to dispense with British protection against the fleets of France and other powers, which might easily have snapped up such a tempting prize as the settlement at Port Phillip. Yet this is the logical inference from their letter. If the sovereignty in the soil were vested in the aboriginals, it could not be vested in the Crown; the territory of Port Phillip would be alien soil, and Great Britain would have no right to take the smallest part in its concerns, nor to interfere, except on grounds of expediency, to save it from appropriation by any foreign power. And John Batman and his friends would be legal subjects of Jagajaga, Moowhip, and Mommarmalar,<sup>2</sup> the aboriginal chiefs.

<sup>1</sup> To be found in Bonwick, p. 160. The letter, as printed in Bonwick, does not bear any address. It is probable that the writers thought they were addressing Lord Aberdeen, who held office till May 1835, on the 12th of which month Mr. Charles Grant (created Lord Glenelg) was appointed. The news of this change cannot have reached Van Diemen's Land by the 27th June.

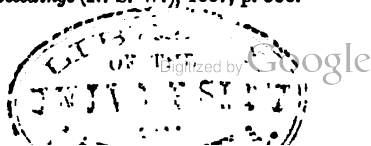
<sup>2</sup> The alleged deed of feoffment is to be seen in the Public Library at Melbourne, and is interesting from an antiquarian point of view. The names of the chiefs must have been purely conjectural. The aboriginals of 1835 were not accustomed to the use of the pen, and did not sign their names. Doubtless they thought it a good joke to make little black marks on a sheepskin.

On any other supposition, the land, according to the well-known constitutional principle, was vested in the Crown. Whether the territory of Port Phillip were truly a No-man's-land, discovered and occupied by British subjects, or whether it were already British soil, within the jurisdiction of New South Wales or any other jurisdiction, the legal result to the settlers was the same. They could have no title except that which the Crown chose to give them. What arrangement the English government would make for the organisation of the new territory was for it alone, influenced, doubtless, by the circumstances of the case, to decide. It might treat Port Phillip as part of New South Wales, of South Australia, or of Van Diemen's Land, or it might give it a separate government, regarding it as a new colony. The fact (even if it had been so)<sup>1</sup> that none of the commissions of the Australian governors covered the new territory was, as between the British government and its subjects, immaterial; for these were mere instructions to officials, and could be altered at any time. The fact that Sir Richard Bourke, then Governor of New South Wales, had been expressly forbidden by the same authority to allow settlements in the new region,<sup>2</sup> was also immaterial, and on the same grounds. For the English law recognises no title to land by *occupatio* in its subjects. There is not any No-man's-land within its dominions; all is vested in the Crown. And if the British subject colonises land which is outside British dominions, he does so as an agent of the Crown, who may be disavowed if he acts without authority, but whose territorial acquisitions belong to his principal.

This was practically the view adopted by the authorities both in England and Australia. To the latter naturally belonged the first step, which was taken by Sir Richard Bourke when, on the 26th August 1835, he issued a proclamation claiming Port Phillip as part of the territory comprised within his commission, and warning the settlers that all persons found

<sup>1</sup> But it was not. Cf. the limits of the commission of Governor Macquarie printed in the volume of Australian papers (Pub. Lib. 443, 9, 15, p. 372), and that of Governor Bligh therein recited. I doubt if a copy of Governor Bourke's commission is to be seen in Victoria, but I have seen the original at Sydney, and it includes everything on the mainland up to the present boundary of Western Australia.

<sup>2</sup> Cf. Letter of Sir R. Bourke in *Votes and Proceedings* (N. S. W.), 1837, p. 588.



in possession of land without Crown authority would be treated as trespassers.<sup>1</sup>

But the settlers appealed directly to the Home authorities, sending an agent to England to represent their views. The answer he received was decisive. He took the private opinions of four distinguished counsel, and three of them agreed that the soil of Port Phillip was vested in the Crown. The fourth (Dr. Lushington) came to a different conclusion on this point, for reasons not stated; but all the four counsel agreed that the grants from the aboriginals were not valid as against the Crown.<sup>2</sup>

The action of the Government evidently proceeded on the same conclusions. Lord Glenelg (the Secretary of State for War and the Colonies) at once declared that the new settlement fell within the jurisdiction of the Governor of New South Wales, and, in spite of repeated applications, declined to interfere in any way between Sir Richard Bourke and the settlers, mainly on the ground that a general principle for dealing with Crown lands in Australia had been laid down, and that to depart from it would create confusion. The claim of the settlers fell from recognition to confirmation, then to compensation on equitable grounds,<sup>3</sup> and on this footing it was ultimately recognised, to a limited extent, by the executive council at Sydney.<sup>4</sup>

The decision of the Colonial office left the new settlement of Port Phillip to be organised by Sir Richard Bourke. We must now see how he set about the task.

<sup>1</sup> *Gov. Gazette* (N. S. W.), 2d Sept. 1835. Copies also in Rusden, *History of Australia*, ii. p. 71; and Richards, *Official History of N. S. W.* p. 62.

<sup>2</sup> Documents in Bonwick, pp. 376-381.

<sup>3</sup> See correspondence in Bonwick, pp. 381-406.

<sup>4</sup> *Gov. Gazette* (N. S. W.), 4th May 1839. And cf. Richards, p. 65; Bonwick, p. 411; and Rusden, ii. p. 79.

## CHAPTER IV

### THE ORGANISATION OF PORT PHILLIP

ON the 9th September 1836, Governor Bourke, having received from an official sent for the purpose a report upon the state of affairs, proclaimed the new territory of Port Phillip open for settlement, and appointed Captain William Lonsdale, of the 4th or King's Own Regiment, to be police magistrate of the district.<sup>1</sup> From the official report<sup>2</sup> we learn that in June 1836 the settlement consisted of 177 persons, some living in the "town" of Bearbrass (the Melbourne of 1836), which comprised thirteen buildings ("three weather-boarded, two slab, and eight turf huts"), and others scattered round in various "stations," some as many as 30 miles from the main settlement. The extent of territory claimed by the settlement was about 100 square miles, but no one had been known to penetrate more than 70 miles into the interior. The movable possessions of the settlers consisted of about 26,000 sheep, 57 horses, and 100 head of horned cattle. Sixty acres of land had been under cultivation in the previous season, and the wheat grown upon them was said to be of excellent quality; but the great object of the settlers was pasture, not agriculture. Eleven small vessels, of a total register of 1500 tons, were employed in the trade between Van Diemen's Land and Port Phillip, principally to bring stock from the former colony.

Such was the community which Governor Bourke had to organise. But it is worth noting, both as a contribution to the data of political science, and as a characteristic of the Anglo-Saxon race, that the earliest attempt at organisation came from

<sup>1</sup> In *Gov. Gazette* (N. S. W.), 14th Sept. 1836 (Parl. Lib.) Also in *Sydney Gazette*, 13th Sept. 1836.

<sup>2</sup> Copy in Bonwick, p. 419.



the settlers themselves. On 1st June 1836 a meeting of residents was held, which framed an exceedingly simple scheme of government. One official only was appointed, an arbitrator, to whose decision in all disputed matters, as well as in cases of aggression upon the aborigines, the settlers present bound themselves to conform without appeal. The meeting also determined to petition the Governor of New South Wales for the appointment of a resident magistrate, with assistants chosen from the settlers. These were the only political resolutions of the meeting.<sup>1</sup>

Captain Lonsdale arrived at Port Phillip on 1st October 1836. He brought with him, apparently, two or three surveyors, a few soldiers, and two constables.<sup>2</sup> Three months after his arrival the prison at Port Phillip was proclaimed one of the common gaols of the colony.<sup>3</sup> It is worth while to notice the order in which the institutions of a community develop. We have seen how important a part was played in the early organisation of New South Wales by the administration of justice. In the new community of Port Phillip the first institution is an arbitrator, the second a police magistrate, the third a constable, and the fourth a gaol.

The great event of the year 1837 was the visit of Governor Bourke in person in the month of March,<sup>4</sup> which was followed almost immediately by the appointment of two additional police magistrates,<sup>5</sup> and by the proclamation which named the bay at the northern extremity of Port Phillip "Hobson's Bay," after the commander of the ship which conveyed Captain Lonsdale to the settlement, and directed the sites of two towns to be laid out, one on the western shore of Hobson's Bay, to be called William's Town, the other on the right bank of the Yarra, to be known as Melbourne.<sup>6</sup> In the month of September of the

<sup>1</sup> Account given in Bonwick, p. 416.

<sup>2</sup> Mr. Bonwick (p. 424) says *one*, Howson, but two (Day and Dwyer) were district constable and constable respectively by order of 13th Sept. (*Gov. Gazette*, N. S. W., 14th Sept. 1836). The number of the surveyors is corroborated by the *Sydney Gazette* of 17th Sept. 1836.

<sup>3</sup> *Gov. Gazette* (N. S. W.), 28th Dec. 1836.

<sup>4</sup> See official account in *Gov. Gazette* (N. S. W.), 29th March 1837 (Pub. Lib.)

<sup>5</sup> *Gov. Gazette* (N. S. W.), 12th April 1837. One of these was Mr. James Simpson, the arbitrator appointed by the meeting in June 1836.

<sup>6</sup> Proclamation of 10th April 1837 in *Gov. Gazette* (N. S. W.), 12th April 1837 (Parl. Lib.) Melbourne was of course named after the Prime Minister of the day, William's Town (afterwards Williamstown) doubtless after the reigning king, William IV.

same year the town of Geelong obtained its police magistrate<sup>1</sup> and constables,<sup>2</sup> and on the 26th October 1838 the plan of the township received the Government approval.<sup>3</sup> In July 1840 the town of Portland was opened for settlement,<sup>4</sup> in August it received its police magistrate,<sup>5</sup> and in November its own petty sessions.<sup>6</sup> As each of these towns was founded, land within it was opened to public sale, on terms to be hereafter explained. Here it is sufficient to point out that Victoria, unlike England, is a community whose early government was based upon towns and town institutions. Before five years of its history had passed away, it contained four principal towns, which have since become great centres of commercial life and political activity. It is the Country of the Four Towns, and all its institutions bear the impress of town life.

On the 14th August 1838 the Governor issued a proclamation,<sup>7</sup> under the 3 Will. IV. No. 3, naming Melbourne as a place for the holding of Quarter-Sessions, and this proclamation was immediately supplemented by an Act (2 Vic. No. 5) applying to the new court the jury system then in existence in New South Wales, and providing elaborately for the empanelling of juries.

But it soon became evident that the community required more extensive powers of government than those vested in a police magistrate, and accordingly, on the 31st July 1839,<sup>8</sup> Mr. Charles Joseph Latrobe, an official sent out from England at the request of Governor Bourke, was gazetted "Superintendent of Port Phillip." A few weeks later a second proclamation defined his district as "that portion of the territory of New South Wales which lies to the south of the 36th degree of south latitude, and between the 141st and 146th degrees of east longitude," and declared that within those limits he should exercise the powers of a Lieutenant-Governor.<sup>9</sup> At the same time an addition was made to the official staff of Port Phillip by the appointment of an under-treasurer, with power to license auctioneers,<sup>10</sup> and on the 26th of October a clerk of the peace was appointed.<sup>11</sup>

<sup>1</sup> *Gov. Gazette* (N. S. W.), 6th Sept. 1837 (Parl. Lib.)

<sup>2</sup> *Ibid.* 13th Sept. 1837 (Parl. Lib.)

<sup>4</sup> *Ibid.* 22d July 1840 (Parl. Lib.)

<sup>6</sup> *Ibid.* 4th Nov. 1840 (Parl. Lib.)

<sup>8</sup> *Ibid.* of date.

<sup>10</sup> *Ibid.*

<sup>3</sup> *Ibid.* 28th Nov. 1838 (Parl. Lib.)

<sup>5</sup> *Ibid.* 19th Aug. 1840 (Parl. Lib.)

<sup>7</sup> *Ibid.* 22d Aug. 1838 (Parl. Lib.)

<sup>9</sup> *Ibid.* 11th Sept. 1839.

<sup>11</sup> *Ibid.* 6th Nov. 1839.

Soon after the arrival of the Superintendent, provision was made for the local administration of civil justice by the Act 3 Vic. No. 6, which established a Court of Requests at Melbourne, the sitting days of which were fixed, by proclamation of the 5th October 1839,<sup>1</sup> as the first Tuesday in each month, but were subsequently changed to the first Mondays of the months of January, April, July, and October,<sup>2</sup> to coincide with the Quarter-Session days fixed for the same dates.<sup>3</sup>

The growing importance of Melbourne was marked by the issue on 23d March 1840 of a proclamation,<sup>4</sup> dividing the town into two districts of north and south, corresponding roughly with the division made by the Yarra river. But Melbourne soon outstripped all such temporary measures, and emancipated herself very largely from the magisterial government of Port Phillip, by the acquisition, in the year 1842,<sup>5</sup> of her municipal constitution, thereby laying the first foundations of recognised self-government in Victoria. The important subject of early municipal government in Melbourne will require special treatment. We may close this chapter with a reference to another great step in commercial development marked by the Order of the Privy Council of 5th March 1840,<sup>6</sup> declaring Melbourne to be a "Free Port" and "Free Warehousing Port" within the meaning of the Imperial Act 3 & 4 Will. IV. c. 59. This statute enabled the King in Council to proclaim certain places "Free Ports," *i.e.* ports with the exclusive right to the *foreign* trade (export and import) of a certain district, and "Free Warehousing Ports," *i.e.* ports where goods might be deposited under bond without payment of duty.<sup>7</sup> Curiously enough the imperial statute only empowers the Crown to declare Free *Warehousing* Ports "in His Majesty's possessions in America,"<sup>8</sup> and it is somewhat doubtful if the Act was ever intended to apply to Australia; but the legality of the proclamation of 1840 has, I believe, never been questioned. The port of Melbourne long remained without any special government of its own, but in the year 1876 the Melbourne Harbour Trust, a corporation with considerable powers, was established

<sup>1</sup> *Gov. Gazette* (N. S. W.), 9th Oct. 1839.

<sup>2</sup> *Ibid.* 1st Jan. 1840.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* 28th March 1840.

<sup>5</sup> By N. S. W. Act, 6 Vic. No. 7. <sup>6</sup> *Gov. Gazette* (N. S. W.), 19th Aug. 1840.

<sup>7</sup> 3 & 4 Will. IV. c. 59, §§ 23 and 36-40.

<sup>8</sup> *Ibid.* § 36.

by Victorian statute.<sup>1</sup> The imperial statute of 1833 was part of a general scheme, commenced under the Commonwealth, and known generally as the "Navigation Laws," which had for its object the encouragement of British shipping by placing severe restrictions upon the entry of foreign trading vessels into English ports. The statute of 1833 was repealed in 1845,<sup>2</sup> but practically re-enacted at once.<sup>3</sup> The main provisions of the system were abandoned in 1850.<sup>4</sup> Meanwhile the 33d section of 3 & 4 Will. IV. c. 59, empowered the Governor of any colony, with the advice of his Executive Council, to proclaim a Customs House at any port, and prohibited all importation except at proclaimed ports.

<sup>1</sup> 40 Vic. No. 552, amended by Nos. 749 and 763.

<sup>2</sup> By 8 & 9 Vic. c. 84.

<sup>3</sup> By 8 & 9 Vic. c. 93.

<sup>4</sup> By 12 & 13 Vic. c. 29.

## CHAPTER V

### THE LAND SYSTEM OF PORT PHILLIP

SINCE the days of Harrington, it has been a truism that the distribution of the land of a country determines the balance of political and social power within it. It becomes therefore of the first importance, in studying the political development of a community, to ascertain the lines upon which this distribution proceeds.

The land systems of British colonies have been based upon a most remarkable application of old ideas to new facts. Without going into details, it may be said that England has passed through the feudal stage of existence, in which all political and social relations are symbolised and guaranteed by the relationship of each individual to the land. In this stage, the king, the supreme political and social power, is also supreme, or, more properly speaking, sole landowner. The great nobles, next to him in power and wealth, are next to him in relation to the land; they hold *of* him, as it is said, their great territorial estates, they are his immediate tenants. Next to them come the knights and squires, the landed gentry, who stand in like relation to the great nobles for their estates. Below them again are the farmers in the country and the burghers in the towns, very probably representing the old free settlers of pre-feudal times, but forced by feudal theories into this dependent relationship. And last of all come the semi-servile classes, the thralls, serfs, and knaves, whose condition, at first very degraded, rises precisely in the degree to which they can secure a permanent tenancy of their holdings.

The completeness of this system in England had given way, long prior to the acquisition of her great colonial possessions,

before the rival influences of education and commerce, with their readjustment of political and social conditions. But enough survived to produce one great practical result. In England nearly all the land had long been in private hands, and the theory of the Crown ownership of the soil only came to light on rare occasions, when, for example, no other claimant could be found for an estate, or when a landowner was convicted of felony, and his acres escheated to the Crown in default of other lords. But when the vast vacant lands of the colonies came to be disposed of, the theory woke to new life. It was this doctrine that gave to William Penn and Lord Baltimore their titles in New England. It was this theory which was called into play when free settlers first began to emigrate, about the beginning of the present century, to Australia.

At first there seems to have been no regular system of disposing of the Crown lands in Australia.<sup>1</sup> All grants were finally made by the colonial Governors, in pursuance of the powers contained in their commissions; but immigrants frequently arrived from England with "land orders" entitling them to government grants, and the Governors used their own discretion with regard to local claimants. In this way about 600,000 acres of land were disposed of in New South Wales alone before the year 1823.<sup>2</sup> Conditions as to payment of perpetual quit-rents to the Crown and other returns were frequently imposed in the grants, and improvements upon the land so granted were generally considered grounds for increased grants to the improvers.<sup>3</sup> Notwithstanding these lavish aliena-

<sup>1</sup> Governor Macquarie's *Instructions* (Nos. 9 and 12) attempted to frame a scale of grants to ex-convicts and freemen respectively. In the case of the former a quit-rent of sixpence for every 30 acres, and of the latter of one shilling for every 50 acres, was to be payable at the expiration of ten years from the grant. But from the return alluded to in the next note, it is obvious that this scale was disregarded (cf. *Instructions* in vol. of Australian Papers, Pub. Lib. 448, 9, 14, p. 374).

<sup>2</sup> Evidence of Mr. Kelsey (House of Commons Reports of Committees, 1836, vol. v. p. 699). Of course, as in all such cases, a customary rule tended to establish itself. In Van Diemen's Land the understanding was that a man could get an acre of Government land for every pound which he could persuade the Government that he possessed (evidence of Mr. William Bryan, *ibid.* p. 715). Particulars of grants made between 1812 and 1821 can be seen in a volume of Australian Papers (Pub. Lib. ref., 448, 9, 14, p. 94).

<sup>3</sup> Evidence of Mr. William Bryan (House of Commons Reports, 1836, vol. v. p. 716).

tions, great discontent was excited by the system. As might have been expected, accusations of favouritism and corruption were freely made, and apparently with good reason.<sup>1</sup> And it seems to have been the custom for the lawyers of the period to agitate the landowners of the community by throwing out dark hints as to the validity of titles resting on colonial grants.<sup>2</sup>

The first attempt to introduce a settled scheme appears to have been made in the year 1824, when the Colonial office published a summary of Regulations respecting grants of land in New South Wales and Van Diemen's Land.<sup>3</sup> The summary stated that it was proposed to divide the whole territory into counties, hundreds, and parishes<sup>4</sup> (after the English model), the parish to be of an average area of 25 square miles. A complete valuation of lands throughout the colony<sup>5</sup> was to be made, and an average price struck *for each parish*, at which price all lands were to be open for sale<sup>6</sup> in blocks usually of 3 square miles, with a maximum limit to any individual of five blocks, though the Secretary of State was prepared to consider special applications for larger grants.<sup>7</sup> The purchase money was to be paid in four quarterly payments, but any purchaser who, within ten years of his purchase, should have relieved the public from a charge equal to ten times the amount of his purchase money, by the employment and maintenance of convict labour, would be then entitled to a return of his purchase money without interest. The cost of each convict to the government was fixed for this purpose at the rate of £16 a year.

But the Regulations contemplated other arrangements than the out-and-out purchase of land. To persons who established to the satisfaction of the Governor their power and intention to

<sup>1</sup> Evidence of Mr. William Bryan (House of Commons Reports, 1836, vol. v. p. 717). <sup>2</sup> *Ibid.* p. 720. <sup>3</sup> Copy in *ibid.* p. 752.

<sup>4</sup> Apparently this object was entrusted to a specially created department known as the Commission for Apportioning the Territory of New South Wales, abolished in 1830 (Papers handed in by Sir George Grey, *ibid.* p. 521).

<sup>5</sup> It will be remembered that at this time Van Diemen's Land was part of the colony of New South Wales.

<sup>6</sup> The words are "put up to sale," but auction is obviously not intended. There is to be no competition.

<sup>7</sup> This provision doubtless referred to the contemplated establishment of the Australian Agricultural Company and other great commercial speculations.

expend in the cultivation of the land a capital equal to at least half the value of it, grants<sup>1</sup> of from 320 to 2560 acres might be made without immediate payment. But at the expiration of seven years from the date of the grant, a quit-rent at the rate of five per cent upon the estimated<sup>2</sup> value would commence to be payable in perpetuity, unless redeemed within twenty-five years by a payment of twenty times its annual amount. On such redemption the grantee would be entitled to credit at one-fifth of the rate before mentioned for maintenance of convict labour. If at the end of the first seven years the grantee failed to prove to the satisfaction of the surveyor-general that he had expended the contemplated amount of capital (which proof was also to be a condition precedent to a second grant), his lands were to be forfeited to the Crown.

But the old influences at work were too strong. The Home government at once proceeded to violate its own policy by creating two great commercial companies, and endowing them with vast tracts of land on special conditions. The Australian Agricultural Company was established by statute 5 Geo. IV. c. 86, and soon after received a large grant of lands in the neighbourhood of Sydney, it is said<sup>3</sup> without payment of any kind. The Van Diemen's Land Company was created by 6 Geo. IV. c. 39, and on the 10th November 1825<sup>4</sup> received its charter, in pursuance whereof various Orders in Council were directed to the Lieutenant-Governors of Van Diemen's Land between the years 1825 and 1837, instructing them to "admit the company to possession" of large tracts of waste land on certain terms, and this possession was transformed into unfettered ownership in fee-simple under the powers of a later Act.<sup>5</sup>

These steps were not only economically doubtful, but they menaced a grave political danger. The history of the East India Company might very well have been repeated in the annals of the Australian companies. Had the stream of immigration

<sup>1</sup> The term "grant" in this connection is generally used in the documents exclusively to represent these special transactions, but of course it must be remembered that the cash purchase would also be effected by a "grant."

<sup>2</sup> This means value estimated at the time of the grant.

<sup>3</sup> By Mr. Rusden (vol. ii. p. 262). An abstract of this charter may be seen in House of Commons Papers (reports), 1836, vol. v. p. 764.

<sup>4</sup> See preamble to 10 & 11 Vic. c. 57.

<sup>5</sup> 10 & 11 Vic. c. 57.



to Australia been anything like so rapid as it has long been to America, the directors of these great landowning corporations would soon have become local magnates with wealth and influence enough to defy the governments at Sydney and Hobart Town. Happily for all parties, the scantiness of the population of Australia prevented such a catastrophe, and the companies have all along had only an economic importance.

But the regulations of 1824 seem to have met with little better fate in the colony itself. They were, of course, published in due form on their receipt by Governor Darling, who, however, ventured on his own authority to alter the area of the average block from 3 square miles to one-third of that extent. But the Governor appears to have taken a still stronger step, for, appended to the order publishing the Regulations, is the ominous notice: "With reference to the above, his Excellency the Governor must decline receiving, until further notice, any more applications for the purchase of Crown lands."<sup>1</sup>

The main object of the Regulations, the establishment of a system of cash sales, probably, therefore, failed entirely. The Home government repeated its announcement in the year 1826,<sup>2</sup> but in the year following it modified its terms, and introduced a system of competition by tender for purchased lands (selected by claimants and then announced as open for sale), while allowing the payment to be made in half-yearly amounts at the discretion of the Governor. A still greater change was made in the conditions of grant without purchase. The Governor, after a thorough investigation of the claimant's assertions by a Land Board, was to be entitled to make a grant at the rate of one square mile for every £500 of capital proved by the applicant, but not exceeding in any case 4 square miles. The rights of the Crown in the land for public purposes were to be reserved, and the land was to be forfeited upon failure of proof, at the end of seven years, of the expenditure upon it of capital to the extent of one-fourth of its survey value. After seven years the old quit-rent of five per cent would begin to run, but it would be redeemable at any time at twenty years' purchase. A final Regulation, of great importance, provided that the personal residence of the grantee, whether with or without purchase, or at least the maintenance of a free man of

<sup>1</sup> House of Commons Reports, 1836, vol. v. p. 753.

<sup>2</sup> *Ibid.* p. 754.

approved character, on the land, should be deemed an essential condition of holding.

Under these regulations, often modified by the colonial Governors, who conceived themselves warranted, by their superior knowledge of local circumstances, to alter the policy of the Home government, grants of land proceeded in New South Wales up till the year 1831. By that date upwards of three millions and a quarter acres had been disposed of since the year 1822,<sup>1</sup> making a total of about four millions alienated under the old system.

Lord Ripon's Regulations of 1831<sup>2</sup> laid down the great principle that thenceforth no lands would be disposed of otherwise than by public sale. Even in the case of military officers entitled to free grants, the lands selected were still to be open to public competition, the claimants being allowed to deduct certain sums, representing the value of their rights, from their purchase-money. All unappropriated lands in the colony were to be considered open for sale at a minimum or upset price of five shillings an acre, and applicants were to be allowed (subject to certain limits) to "select" such portions as they might prefer. But such selections would be advertised for sale for three months, and then put up to auction at the upset price, in lots averaging one square mile each. Upon payment of his purchase-money the purchaser would be entitled to a grant in fee-simple at a nominal quit-rent. The Crown reserved the right to effect public improvements, and also the rights to all mines of precious metals and coal.

These Regulations were enforced in the colony by Government Order of the 1st August 1831,<sup>3</sup> which, however, put a curious construction on the term "limits" contained in the Regulations. The "limits" of selection contemplated by the Colonial Office appear to have been limits of quantity, not of locality.<sup>4</sup> But the limits prescribed by the Government Order<sup>5</sup> are those of locality, not of quantity. Selection may only be made (except in special cases) from surveyed parishes,<sup>6</sup> while it is expressly announced that "all free persons will be eligible as purchasers

<sup>1</sup> Evidence of Mr. Kelsey (H. of C. Reports, vol. v. p. 699).

<sup>2</sup> Copy in *Votes and Proceedings* (N. S. W.), 1847 (1), 635.

<sup>3</sup> *Votes and Proceedings* 1847 (1), 636.

<sup>4</sup> Cf. Regulations of 1831, Sections (1) (2) and (4).

<sup>5</sup> Sections 1 and 2.

<sup>6</sup> The limits of selection had been previously fixed by proclamation of 14th

of land without any limitation as to quantity."<sup>1</sup> At first no distinction was made between town and country lands, the difference in value being left to the natural effect of competition. But in the year 1833 an order was issued requiring the purchaser of each town allotment to give security to erect a permanent building, worth twenty pounds at least, within two years of his purchase.<sup>2</sup>

It was under these Regulations that the first lands in Port Phillip, which had been announced as open for settlement by the proclamation of the 9th September 1836, were disposed of. The first sale took place on the 1st June 1837 at Melbourne, when town allotments of half an acre each in Melbourne and Williamstown were put up. Another sale was held in the same place on the 1st November, and another at Geelong in February 1839.<sup>3</sup> The details of these transactions do not belong to our purpose, but it is worth noting that, in announcing the Geelong sale, the Governor took the step of fixing the upset price at £5 an acre.<sup>4</sup>

But the question of land sales in Australia was attracting the attention of the Home government. Ever since the publication of the report of the committee of 1836, there had been a feeling that some definite policy ought to be adopted, not only with regard to the methods, but the proceeds of sale. The recommendations of the committee of 1836 had been that the whole of the arrangements connected with the sale of land should be placed in the hands of a central land board in London, having local boards as its agents in the different colonies, and that the proceeds of the sales should form an emigration fund, by means of which the colonists should be supplied with free labour.<sup>5</sup> At the beginning of the year 1840, one half of these recommendations were carried into effect by the appointment of a Royal Commission of three

October 1829. They comprised 19 counties (cf. *Australian Almanack* for 1833, p. 87). For the method of dividing a county into hundreds and parishes cf. Letters-Patent of 16th May 1835, in *Votes and Proceedings*, 1847 (1), p. 644.

<sup>1</sup> Sect. 15, Gov. Order, 1st August 1831.

<sup>2</sup> *Votes and Proceedings*, 1847 (1), p. 640. This regulation was rescinded on the 30th Nov. 1839 (*ibid.* p. 693).

<sup>3</sup> On the 17th January 1839 the minimum price throughout the colony had been raised from 5s. to 12s. an acre (*Votes and Proceedings*, 1847 (1), 676).

<sup>4</sup> *Gov. Gazette*, 28th November 1838.

<sup>5</sup> Report. Pars. 6 and 7 (H. of C. Reports, 1836, vol. v. p. 502).

well-known philanthropists<sup>1</sup> as "The Colonial Land and Emigration Commissioners," to supersede the old South Australian Commissioners and the Agent-General for Emigration. They were charged with the fourfold duty of—

- (1) Diffusing information about the colonies.
- (2) Effecting sales of land in the colonies.
- (3) Assisting emigrants to proceed to the colonies.
- (4) Rendering accounts of the land funds.

In regard to the second of these duties, the Instructions of the commission followed the recommendation of the committee of 1836, but with an important modification. They laid down the maxim that "the Crown lands in the colonies are held in trust, not merely for the existing colonists, but for the people of the British Empire collectively." But while they thus approved the policy of the committee, the Instructions admitted that public local claims were the first charge on the Land revenue; the Imperial share, to be expended mainly in the assistance of high-class emigration, was to rank second.<sup>2</sup> The actual grants of Crown lands, as theretofore, were to be made by the Governors, but the commissioners were to have joint power of contracting for sale.<sup>3</sup> They were directed to inquire whether the system of sale at a fixed price, with priority for claims according to date, then followed in South Australia, or the system of auction at an upset price, then practised in New South Wales, was the best.

Apparently, on this latter point, the commissioners decided that the South Australian system was to be preferred, for in the "Additional Instructions" of the 23d May 1840,<sup>4</sup> which Lord John Russell, the Secretary of State, forwarded to Sir George Gipps (Sir Richard Bourke's successor in the Governorship of New South Wales), the Governor was directed to sell all lands in the Port Phillip District (directed by the In-

<sup>1</sup> Colonel Torrens, Mr. R. F. Elliott, and Mr. Edward Villiers.

<sup>2</sup> The separation of the Land Fund from the general revenue, and its appropriation to the expenses of emigration, had been adopted, as a matter of practice, since 1832, in pursuance of a despatch of Lord Goderich (H. of C. Sess. Papers, 1840, vii. p. 561).

<sup>3</sup> This power was soon seen to be unpracticable of exercise, and was exchanged for the power to grant certificates of receipt which could be treated as cash by the Colonial government.

<sup>4</sup> H. of C. Sess. Papers, 1840, vol. vii. p. 667.

structions to be created) at a uniform rate, to be from time to time fixed by the Home government. The power of the commissioners in England to contract would be limited to the issue of certificates to persons who had actually paid money into the hands of the agent for the colony in England, which would simply be treated as bankers' receipts. The despatch, dated 31st May 1840,<sup>1</sup> which accompanied these instructions provided for a division of the territory of New South Wales into three Districts, fixed the sale price of lands in the Port Phillip District at £1 an acre, but directed the continuance of the practice of sale by auction in those towns in which it had been already established, and also authorised very rare reservations for the sites of towns ("only the probable situations of considerable seaports") in other parts of the District, in which reservations the lands were to be sold at £100 an acre.

Upon the receipt of these documents, the Government of New South Wales issued the very important Land Regulations of the 5th December 1840.<sup>2</sup> These Regulations divided the territory of New South Wales, *for all purposes connected with the disposal of land*, into three Districts, to be known respectively as the "Northern" District, the "Middle" or "Sydney" District, and the "Southern" or "Port Phillip" District. The first of these Districts practically comprised all the lands north of latitude 32° south, but it was expressly noted that its northern limits were not yet fixed. The second comprised the nineteen counties before alluded to, being bounded on the north by the southern boundary of the first district, "and on the south by the southern boundaries of the counties of St. Vincent and Murray, and thence by the rivers Murrumbidgee and Murray to the eastern boundary of the province of South Australia."<sup>3</sup> The third, or Port Phillip District, included all the lands to the south of the southern boundary of the Sydney District.

Following the lines laid down by the Instructions, the

<sup>1</sup> H. of L. Sess. Papers, 1840, vii. p. 664.

<sup>2</sup> *Gov. Gazette*. (N. S. W.), 9th December 1840.

<sup>3</sup> It will be observed that the present boundary of New South Wales comes a good deal south of these limits, including some twenty new counties. The names and boundaries of the Districts had, however, been definitely settled by the Instructions of the 31st May 1840, and represent the views of the Home government, not of Sir George Gipps. For the change cf. *post*.

Regulations went on to provide that in Port Phillip District all country lands should be open for sale, after survey, at the uniform price of £1 an acre, that allotments in towns (especially including Melbourne, Williamstown, Geelong, and Portland) where the practice of auction sales had been established, should continue to be sold by auction, but that in newly laid out towns allotments should be sold at an uniform price, for the present £100 an acre. There was to be no reservation of minerals, except in rare cases.<sup>1</sup>

But the most important clause of all in the Regulations was the last, which announced that for the present no further sales of land near the four towns would take place. It was quite evident that Sir George Gipps did not approve of the policy of a fixed sale price.

But the Governor did more than merely abstain from applying the Regulations to the suburban lands. He remonstrated vigorously with the Home government, pointing out that the adoption of the fixed price of £1 an acre, within a five-mile circuit round Melbourne and Geelong alone, would entail a loss to the Crown of nearly a million sterling.<sup>2</sup> He could also point to a secondary result of the adoption of the fixed price system, in the "special surveys" which were occasionally demanded by immigrants who arrived with Land Orders to a large amount. The first case was that of a Mr. Henry Dendy, who had paid in London for eight square miles of Port Phillip land the fixed price of £1 an acre, and who claimed, on his arrival in the year 1841, to select his eight square miles, either from the unappropriated surveyed land as near to the towns as possible, or to have a block specially surveyed for him at his own selection.<sup>3</sup> The Superintendent at Port Phillip could not refuse to honour the land certificate, but the practice threatened to be so serious that he declined to act upon it without special instructions from the Governor,<sup>4</sup> and the latter took the responsibility of issuing Regulations for

<sup>1</sup> Regulations for the sale of land at Port Phillip under the fixed price system were issued on the 21st January 1841. They merely prescribe details (*Votes and Proceedings*, 1847 (1), p. 698).

<sup>2</sup> Letter of 19th December 1840 in *Votes and Proceedings* (N. S. W.), 1842, p. 11.

<sup>3</sup> *Ibid.* p. 34.

<sup>4</sup> Letter of La Trobe to Governor Gipps (*Votes and Proceedings* (N. S. W.), 1842, p. 33.)

the control of special surveys, which materially circumscribed the choice of the applicants.<sup>1</sup> It was, of course, a strong step to take, for Mr. Dendy had been offered £15,000 for his certificate on the day of his landing, and the effect of the new Regulations would doubtless be to depreciate seriously the commercial value of his claim. But the case was so forcible that the Home government promptly endorsed the action of Sir George Gipps,<sup>2</sup> and put a stop to further "special surveys," directing a return to the old system of auction at Port Phillip, with certain small exceptions. By a government notice issued on the 10th February 1842,<sup>3</sup> founded on the letter of Lord John Russell and the additional instructions under the sign-manual, the old system of selling lands by auction was restored for Port Phillip in all cases, except the one case of *country* lands remaining unsold at an auction, which were then to be open for selection at the upset price.

The importance of these various Regulations, and the transactions to which they gave rise, can hardly be overrated in considering the history of Victoria. They introduced into the administration of the mother-colony three great changes, of which two were destined to be permanent, while the third, though soon afterwards reversed, was not without great effect. In the first place they established the rule, which so long prevailed with regard to the Land fund of the colony, that one half of it should be devoted to Public Works, and one half to immigration. In the second, they introduced or at least gave official sanction to the idea of the separate existence of Victoria and Queensland. And in the third place, they effected for the time a complete change in the method of the sale of Crown lands in Port Phillip. The last effect proved, however, as we have seen, to be only temporary.

But the policy of the Regulations was utterly distasteful to many influential people in New South Wales. They disliked the idea of separation altogether, they especially disliked the

<sup>1</sup> Regulations of 4th March 1841 in *Gov. Gazette* (N. S. W.), 12th March 1841. The special survey system was abolished on the 28th August 1841, in pursuance of directions from the Home government (*Votes and Proceedings*, 1847 (1), p. 783).

<sup>2</sup> Letter of Lord John Russell, 27th August 1841 (*Votes and Proceedings* (N. S. W.), 1842, p. 43). Additional Instructions of 21st August 1841 (*ibid.* p. 41).

<sup>3</sup> *Gov. Gazette* (N. S. W.), 11th February 1842.

actual boundaries adopted. The Legislative Council immediately came to an unanimous resolution to petition the Crown to alter the limits fixed.<sup>1</sup> The objects of this attempt appear to have been twofold: first, to secure to the colony of New South Wales proper<sup>2</sup> "the course of the principal Rivers within the Territory, which have been discovered and explored by the enterprise, and at the expense of the Settlers," and, second, to "preserve the union under one Government of those Districts beyond the present limits of location, which have not only been peopled from this Colony, and occupied by stock, the property of residents within it, but must always continue united with it by the closest ties of a common origin and interest."<sup>3</sup>

We shall see how the petition, which was framed upon this resolution, and duly forwarded to the Home government,<sup>4</sup> bore immediate fruit. But, meanwhile, the statement of its second object has brought us face to face with the other great feature of the Land system of the period, the important process known as "squatting."

It will readily be understood that, while the system of purchase was well enough adapted to the wants of those persons who desired lands only for purposes of agriculture and residence, it did not suit the views of those who wished to carry on the business of stock breeders on a great scale. The time and labour required for agricultural and building operations are so great, that they can usually only operate over a comparatively small area. But the business of sheep and cattle farming, especially of a rough character, can be carried on with very little labour and a much smaller amount of capital, provided that free access to natural herbage and water supply is secured. It would have been ruinous to the stock breeders of the colony to have had to purchase the land on which their flocks and herds were depastured. On the other hand, they were quite willing to take large tracts of very rough and hitherto unexplored country on very short tenures.

<sup>1</sup> The change in the method of sale did not apply to the Middle District, so that the Legislative Council made no reference to it.

<sup>2</sup> It is quite evident that the council recognised that the division into districts foreshadowed the ultimate separation of Moreton Bay and Port Phillip. Cf. the petition at full in *Votes and Proceedings* (N. S. W.), 1840, p. 391.

<sup>3</sup> *Ibid.* p. 387.

<sup>4</sup> See extract in *V. and P.* (Victoria), 1853-54, vol. ii. p. 737.



At first the amount of capital which they invested in permanent improvements was comparatively small. Most of their capital was of a floating character, which could easily be moved from one place to another.

The Land Regulations of the 1st August 1831,<sup>1</sup> before alluded to, contained provisions for the leasing of lands *within* the prescribed limits of settlement, in blocks of one square mile each. These leases, when applied for, were to be put up for sale by auction, at an upset rent of 20s. a block, and the highest rent bid was to secure the block. Such a lease did not secure the lessee, even for a year, for he could be ejected at a month's notice in favour of an applicant who wished to buy the fee-simple.<sup>2</sup> And, at most, his interest was only for a year, the lease being again put up to auction at the expiry of that time.

But these provisions proved wholly inadequate to regulate the occupation of Crown lands *beyond* the limits of location.<sup>3</sup> The vast requirements of the great stock breeders of the colony were satisfied by excursions into what was then really the primæval wilderness, where they appropriated, in symbolic fashion, large tracts or "runs," whose boundaries were often very ill-defined, but which in most cases far exceeded the lease limits of one square mile.<sup>4</sup> Here they lived, a scanty and scattered population,<sup>5</sup> practically beyond Government control, and almost beyond the influence of civilisation. The extent to which this practice prevailed may be seen by a glance at a map drawn up under the directions of Sir George Gipps in the year 1843.<sup>6</sup> From this it appears that these settlers had covered an enormous tract of territory beyond the boundaries of settlement or location,<sup>7</sup> which tract, beginning at Hervey

<sup>1</sup> *Votes and Proceedings*, 1847 (1), 636.      <sup>2</sup> Cf. form of lease in *ibid.* p. 633.

<sup>3</sup> It was said that in Port Phillip District they also failed to secure observance within the limits (cf. Report of Commission of 1855, *V. and P.* (Victoria), 1854-55, ii. p. 296).

<sup>4</sup> Despatch of Sir George Gipps (H. of L. Sess. Papers, 1845, vol. vi. part i. p. 394).

<sup>5</sup> Less than 10,000 in a district measuring 1100 miles across (*ibid.*).

<sup>6</sup> *Ibid.* p. 399.

<sup>7</sup> At this time they were practically the same thing. The scattered huts of the squatters and their riders cannot be called "settlements." Cf. Government Order of 14th October 1829 and Proclamation of 30th July 1830 in *Australian Almanack*, 1835, p. 21.

Bay in the north, swept round Stanley county (then the site of the settlement about Brisbane), round the old nineteen counties of the Middle District, and, in fact, included everything else south of the Darling river except the new county of Auckland (Twofold Bay) and the three counties of Port Phillip—Bourke, Grant, and Normanby.

To check these unauthorised settlements, and to provide some system of government for these outlying districts, the then Governor of New South Wales had, in the year 1833, procured the passing of the "Act for protecting the Crown Lands of this Colony from Encroachment, Intrusion, and Trespass,"<sup>1</sup> previously alluded to, which was followed up by an Act of the year 1836,<sup>2</sup> making it penal to occupy any Crown lands in New South Wales beyond the limits of location,<sup>3</sup> except under a proper Government license.

The last reference points to the fact that by this time Government had realised the impossibility of putting a stop entirely to the process of squatting, and had determined to be content with regulating it. Whilst it still asserted the absolute right of the Crown, as of any other landowner, to treat the squatters as trespassers, it practically conceded to any applicant, for a small fee, permission to make a limited use of the Crown land. The whole matter was regulated anew by the important statute 2 Vic. No. 27 (N. S. W.), and a definite scheme projected for the regulation of the squatting interests. By this Act the penalty for unlicensed occupation of Crown lands beyond the limits was placed on precisely the same footing as for a similar trespass within the boundaries. The powers of the Commissioners of Crown Lands were amplified, and a system of adjudication upon disputed points settled. Then came a very important clause requiring all licensees to report full particulars of the breed and ownership of the stock maintained by them, and another, still more important, directing that the Crown land beyond the limits of location should be divided into districts, each under the control of a commissioner (who was also a justice of the peace) with a force of armed and mounted "Border Police." The Commis-

<sup>1</sup> 4 Will. IV. No. 10 (N. S. W.)

<sup>2</sup> 7 Will. IV. No. 4 (N. S. W.)

<sup>3</sup> The "limits of location" at this time coincided with the extreme boundaries of the proclaimed counties. This seems to have been the sole function performed by the counties. Cf. Sess. Papers (H. of L.), 1841, vol. v. p. 4.

sioner was given very wide powers of government, directed especially towards the regulation of the boundaries of runs and the prevention of encroachments, the settlement of disputes between masters and servants, the prohibition of cattle-stealing, and the impounding of strayed beasts. The Commissioners were to keep a register of all persons employed on stations, and of the returns of stock previously mentioned. The Act also imposed a stock-tax or assessment upon the sheep, cattle, and horses of the squatters, leviable, if necessary, by distress, the proceeds of the tax to be appropriated towards the expenses of the maintenance of the Commissioners and the Border Police. Students of property law will see in this Act a notable illustration of the doctrine that the early law of possession is intimately bound up with police regulations, being, in fact, simply the result of protection from violence. For our immediate purpose, it is necessary to see how the policy of the Act was carried into effect.

On the 21st May 1836, shortly before the Act came into operation, Regulations for the granting of licenses to occupy Crown land were published by the Government.<sup>1</sup> It was announced that licenses would be granted for one year from the 1st July then next, renewable on their expiry, upon a recommendation of the Commissioner of the district. No limits of occupation were to be defined by the licenses,<sup>2</sup> which were, in fact, mere personal permissions (though transferable with the acquiescence of the Commissioners) to depasture stock, and did not give any title to land at all. For each license a fee of £10 was to be paid, and a license only allowed the holder to depasture stock in the district for which it was given. It was expressly notified that all improvements on licensed lands would be at the improver's risk, such lands being liable to be put up for sale upon the extension of the limits of location.

At the same time a proclamation<sup>3</sup> divided the colony of New South Wales into nine pastoral districts, in pursuance of the Act, and among these was the Port Phillip District, including "the whole of the lands comprised in the district lying to the

<sup>1</sup> Copy in H. of L. Sess. Papers, 1845, vol. vi. pt. i. p. 402, *Gov. Gaz.* (N. S. W.), 22d May 1839 (Chief Secretary's office), and *Votes and Proceedings*, 1847 (1), p. 687.

<sup>2</sup> See form in H. of L. Sess. Papers, 1845, vol. vi. pt. i. p. 404.

<sup>3</sup> *Ibid.* p. 398.

south of the main range, between the rivers Ovens and Goulburn, and adjacent to Port Phillip." This District was, by another Order published on the 1st July 1840,<sup>1</sup> subdivided into the Westernport and Portland Bay Districts, the former comprising the lands lying east, and the latter those lying west of the Werribee River. It must also be noticed that the leasing system for lands *within* the boundaries, having been found inconvenient, had been abandoned in favour of the license system by Regulations of the 21st August 1841,<sup>2</sup> so that the license system and the squatting interest may now be regarded as co-terminous.

This brings the Land Question down to the close of the period we are now discussing. The extent to which the license system has been adopted may be guessed from the report of Sir George Gipps previously alluded to. The whole question of Crown lands will come up again in the next period, and it will be necessary to bear in mind the conditions under which it appears. There are two great classes of land-holders. One class consists of purchasers, who have either bought their lands by auction under the Regulations of 1831, or, *in Port Phillip*, at a fixed price of £1 an acre under the Regulations of 1840. The other consists of the squatters, some of whom hold land by lease within the boundaries of location, but the greater part of whom are mere licensees, living beyond the limits of settlement, having no definite holdings, but only vague "runs," with no security for improvements, practically outside the ordinary influence of government, but under the special control of a quasi-military force; the great political features in their horizons being the stock-tax and the Border Police.

<sup>1</sup> *Gov. Gaz.* (N. S. W.), 1st July 1840.

<sup>2</sup> *Votes and Proceedings*, 1847 (1), p. 782.

## CHAPTER VI ✓

### EARLY INSTITUTIONS OF PORT PHILLIP

THE number and character of the institutions of a country are a very fair test of its capacity for self-government. Institutions require a co-operation amongst the members of a community, and an adaptability to the methods of united action, which are the first requisites of a stable political system. The strength of a Constitution which has grown, as distinguished from a Constitution which has been made, lies in the fact that the former has been produced by the gradual coalescence of independent and familiar institutions, which have contributed each its share towards the fabric of government. In studying, therefore, the Constitutional history of a community, especially in its earlier stages, it is important to glance at its early institutions.

Almost the first indigenous institution of Port Phillip was the Melbourne market. The 3 Vic. No. 19 (N.S. W.) directed the police magistrate of any town in the colony, upon the application of 25 free-householders of the town, to call and preside over a public meeting of the inhabitants to consider the advisability of establishing a market. Upon receipt of a favourable resolution, the Governor, with the advice of his executive council, might approve the establishment. Thereupon Commissioners to manage the market were to be elected by occupying householders of the annual value of £20, and proprietors (whether resident or not) of land or buildings to the value of £200, from among the proprietors of land and householders within the limits of the town. These Commissioners were to hold office for three years, and were empowered to erect market-houses, to pass by-laws, and to levy tolls and

dues within certain limits. After the opening of such market all other open sale within the town was to cease. The Commissioners were empowered to enforce their by-laws by the imposition of fines, and to enforce such fines, as well as their tolls and dues, by distress and imprisonment. Their inspectors were empowered to seize food exposed for sale in an unfit condition. The Commissioners were further empowered to farm out the market dues for any period not exceeding one year, and to borrow limited sums of money upon the same security.

In pursuance of the provisions of this statute, a meeting was held in Melbourne on 21st January 1841, at which a resolution in favour of the establishment of a Melbourne market was agreed to.<sup>1</sup> In due course the resolution was reported to the Governor, and a market with Commissioners established. In some countries the gatherings of the inhabitants on market-days have been the origin of the popular element in the government. In Rome they developed into a sovereign assembly. In England they are closely bound up with the early history of popular politics and self-government. But, owing to the peculiar circumstances under which Port Phillip was founded, by settlers already familiar, by tradition at least, with more advanced forms of popular government, the market of Melbourne never acquired any political importance. It soon in fact ceased to have a separate existence, being absorbed into the greater institution of the Corporation of Melbourne.<sup>2</sup>

We may next notice the local branch of the Supreme Court of New South Wales established at Port Phillip. It will be remembered that the Supreme Court had been constituted under the 4 Geo. IV. c. 96, by royal charter dated 13th October 1823.<sup>3</sup> It will also be remembered that courts for the trial of petty offences and for the hearing of small civil cases, Courts of Quarter-Sessions and of Requests respectively, had been established at Port Phillip in 1838 and 1839.<sup>4</sup> What was afterwards required, as the settlement grew in importance, was the presence of a judge qualified to try heavier cases, and thus to obviate the necessity of sending litigants,

<sup>1</sup> Cf. account in *Port Phillip Patriot*, 25th January 1841.

<sup>2</sup> By the 71st and 72d sections of the 6 Vic. No. 7.

<sup>3</sup> *Ante*, p. 12.

<sup>4</sup> *Ante*, pp. 29 and 30.

prisoners, and witnesses a long sea journey to Sydney. This object was accomplished by the 4 Vic. No. 22 (N. S. W.), which empowered the Governor to appoint two additional judges of the Supreme Court, for New Zealand and Port Phillip respectively, with powers limited in exercise to those localities, but otherwise equivalent to the powers of the other members of the Supreme Court. Matters, however, which by the existing law were required to be heard by the Full Court, whether arising in the new districts or not, were still to be subject to review at Sydney, and the new District Judges were not to be entitled to take part in such sittings. The Governor was empowered to appoint deputy-sheriffs and ministerial officers for the Districts, upon the advice of the respective judges, and also, pending the institution of grand juries, to appoint Public Prosecutors, and Quarter-Sessions prosecutors, in whose names offences might be prosecuted in the districts. He was also empowered to direct Circuit Courts to be holden throughout the colony before single judges of the Supreme Court, in the English fashion. Writs of execution and subpcena of the Supreme Court, wherever issued, were to be available throughout the colony; but where a judge might previously have ordered an arrest on mesne process upon an affidavit of an intended departure beyond the jurisdiction, he was now, if resident at Sydney, empowered to make the order upon evidence of an intention to depart to Port Phillip or New Zealand, and *vice versâ*.

One week after the passing of this Act was passed another statute,<sup>1</sup> which boldly applied the jury system to Port Phillip, by providing that all crimes and misdemeanours, and all civil issues of fact, whether heard in the Supreme Court or a court of Quarter-Sessions, should be tried by a jury of twelve inhabitants of the district, qualified in manner provided by the Act.<sup>2</sup>

Under these statutes, at the beginning of the year 1841,<sup>3</sup>

<sup>1</sup> 4 Vic. No. 28.

<sup>2</sup> These qualifications were—

- (a) For common jurors. Males between 21 and 60 years of age, having a clear income of £30 from real estate, or £300 clear personalty (adopted from 2 Will. IV. No. 3).
- (b) For special jurors. Persons qualified as common jurors, and registered as esquires or persons of higher degree, as justices of the peace, or as merchants.

<sup>3</sup> *Port Phillip Patriot*, 28th January 1841.

Mr. Justice Willis was appointed first District Judge for Port Phillip of the Supreme Court of New South Wales. In the same year the statutes were amended by another Act,<sup>1</sup> which authorised the Governor to appoint, instead of circuit towns, circuit districts, in the courts whereof civil issues were only to be triable by juries when the Supreme Court should so specially direct. The Act also empowered the Governor to appoint district sheriffs for the circuit districts. In the year 1843 occurred the removal of Mr. Justice Willis.

Thirdly, we may notice the Registry of Deeds, established at Port Phillip under the 5 Vic. No. 21, in imitation of the earlier registry established at Sydney under the 6 Geo. IV. No. 22. The system of Crown grants of course secured to the original grantee of land the best possible evidence of his original title; but in order to complete the security of landowners, it was necessary to make some provision for the record of transfers. The name of Colonel Torrens is inseparably connected with the system of registration of land titles in British territory, although the principle had been tried before his day, in a tentative fashion, in the counties of Middlesex and Yorkshire. The Middlesex and Yorkshire registries, partly owing to the limited areas which they cover, partly owing to the deficiencies of the statutes creating them, and partly owing to the conservative jealousy of English landowners and lawyers, have had but very partial success; whilst all attempts to extend the system in England have been failures.<sup>2</sup> Colonel Torrens was, however, happy in living at a time when his plans could be tried on a magnificent scale in the great new countries then being opened up.<sup>3</sup> The Act which constituted the Port Phillip Registry of Deeds did not, unhappily, make registration essential to the validity of instruments, but it provided that all Crown grants and all instruments except leases for a period less than three years, already or thereafter to be executed, should be enrolled

<sup>1</sup> 5 Vic. No. 4 (N. S. W.)

<sup>2</sup> *E.g.* by the Land Registry Act, 1862 (25 & 26 Vic. c. 53), and the Land Transfer Act, 1875 (38 & 39 Vic. c. 87).

<sup>3</sup> In speaking of Colonel Torrens as the introducer of the Land Registry system, I am, of course, only following current report. There is nothing new under the sun; and it is quite possible that careful investigation might trace the system from Australia to the Cape, from the Cape to Holland, and from Holland to Roman provincial administration.



or registered, and that priority of registration (with certain exceptions) should absolutely determine priority of claim.

Finally, we may notice that which was undoubtedly the most important of all the early institutions of Port Phillip, the Corporation of Melbourne, to which, as the parent of municipal institutions in Victoria, we owe careful attention.

The Corporation of Melbourne was constituted three weeks after the incorporation of the city of Sydney,<sup>1</sup> by the N. S. W. Act, 6 Vic. No. 7. For the purposes of the Act the area of the town of Melbourne was to consist of the parish of North Melbourne and the suburb of Newtown or Collingwood, divided into four wards by imaginary lines drawn down the centres of Bourke Street and Elizabeth Street respectively, and produced to the boundaries.<sup>2</sup> These four wards were to be known as the North-East or Gipps ward, the North-West or Bourke ward, the South-East or La Trobe ward, and the South-West or Lonsdale ward, and were to be properly marked off within six months by the mayor, who was also, in company with the town clerk, to "perambulate the metes and bounds" every three years, and to note any changes of boundary names in the Boundary Book.<sup>3</sup>

The official style of the incorporated town was to be "The Mayor, Aldermen, Councillors, and Burgesses of the Town of Melbourne," and by that style it was to be capable of acting (in the prescribed manner) as a legal personality, suing and being sued, acquiring and alienating property, and having perpetual succession.<sup>4</sup> Of the component parts of the corporation, the burgesses were not, as a rule, to take a direct share in the government of the town, which was placed almost

<sup>1</sup> By the 6 Vic. No. 3 (N. S. W.)

<sup>2</sup> See exact description in Schedule A to 6 Vic. No. 7. These boundaries were extended by the 8 Vic. No. 12.

<sup>3</sup> The "beating of the bounds" (as it is popularly called) is one of the most ancient customs surviving in England at the present day. The boundary of a London parish passes through one of the rooms at the Guildhall, in which, on the occasion of the London sittings, a *Nisi Prius* Court is held. Great is the glee of the boys engaged to do the actual beating, if they can time their arrival so as to compel his lordship to vacate the judicial bench in order that it may be "beaten."

<sup>4</sup> The first two of these qualities distinguish a corporation from a mere casual collection of human beings, the last distinguishes it from all individuals. A corporation has "successors," not "heirs" or "executors," and may never die. Hence the old doctrines of Mortmain.

entirely in the hands of the mayor, aldermen, and council. Thus we get two phases of the corporation—a passive and an active. Let us consider the burgesses first.

By the 12th section of the Act every male person of full age who has for one year<sup>1</sup> previous to any 31st of August occupied any house, warehouse, counting-house, or shop within the town, of the clear annual value of £25,<sup>2</sup> has for the same period been an inhabitant householder<sup>3</sup> within the town or within seven miles thereof, and has paid all the corporation rates due from him in respect of the premises which he so occupies up to six months before the same date, is entitled to be enrolled on the burgess-roll of the town. The disqualifications are—

1. The fact that the applicant is an alien.
2. The fact that within the year he has received eleemosynary relief.
3. The fact that he has had any child admitted to any school for orphan<sup>4</sup> or destitute children in the colony or its dependencies during the previous three years.

But in order to complete his title to burgess privileges, the claimant must secure enrolment. Every year, on or before the 31st August, "collectors" are to be appointed by the mayor for each ward, and the collectors are, on the 5th September following, to deliver to the town clerk alphabetical lists of the persons entitled to be enrolled as burgesses in their respective wards. These lists are to be open to inspection until the 15th September, up to which time any objections may be handed in to the town clerk; and such objections are to be adjudicated upon in each ward by the alderman and by two assessors elected on the previous 1st March, according to the provisions of the Act.<sup>5</sup>

So much for the constituent body of the corporation. Now we come to deal with its government. This again may be conveniently subdivided into two parts; the one comprising the supreme government, actually forming part of the constitution, the mayor, aldermen, and councillors, the other comprising

<sup>1</sup> Reduced to six months by 8 Vic. No. 12.

<sup>2</sup> Reduced to £20 by the 8 Vic. No. 12, and to £10 by the 16 Vic. No. 18.

<sup>3</sup> The differences between occupancy, inhabitancy (or residence), and house-holding must be carefully noted. They are of great importance in a municipal system.

<sup>4</sup> It is a little difficult to see how such a child would qualify for an "orphan" school.

<sup>5</sup> § 33.

the executive officials only, some of whom are expressly contemplated by the Act of Incorporation, the rest being merely ministerial, but all being alike in this, that they form no integral part of the corporation, unless qualified on other grounds.

Of the first part, the most numerous section are the councillors, who by the Act are required to be seized or possessed of real or personal estate, or both,<sup>1</sup> to the amount of £1000, either in their own right or that of their wives, or to be rated on an annual value of £50, and to be entitled to be on the burgess list. The disqualifications for the office are as follows—

1. The fact of being in holy orders, or being a regular minister of any religious congregation.
2. The fact of holding any office (save that of mayor) in the gift of the council.
3. The fact of having a direct or indirect share in any contract or employment with, by, or on behalf of the council.
4. The fact of being a town "assessor," a judge, chairman, officer, or clerk of any court of justice, or a ministerial law officer of the Crown.<sup>2</sup>

The councillors are to be elected by the burgesses, three councillors for each ward. Each enrolled burgess is to have as many votes as there are vacancies, but no cumulative voting is to be allowed, and no burgess may vote in more than one ward. The voting is to be open, in writing. The elections are to take place on the 1st November in each year, before the aldermen and assessors; and the councillors chosen are to sit for three years, going out in rotation, so that one seat for each ward must fall vacant every 1st November. A retiring councillor may, however, be re-elected.<sup>3</sup>

The council is practically the governing body of the corporation. The court of aldermen is mainly executive, and the mayor has no veto on the acts of the council. To the latter body belong the power of legislation (the making of by-laws) and the appointment and superintendence of the executive.<sup>4</sup>

By the provisions of the Act there are to be four aldermen, qualified as and elected by the councillors, but not neces-

<sup>1</sup> It will be noticed that the Act does not prescribe any particular situation for the qualifying property.

<sup>2</sup> § 49. Added to by 27 Vic. No. 178, § 33; cf. *post*, p. 61.

<sup>3</sup> §§ 24-28.

<sup>4</sup> §§ 91, 65. As to the regulation of the elections, cf. 27 Vic. No. 178.

sarily members of the council. The election is to take place on the 9th November in every third year, when the two senior aldermen retire, but are eligible for re-election. The voting is to be open, as in the election of councillors, but no councillor may vote for himself.<sup>1</sup> The disqualifications for the post of alderman are the same as those for the office of councillor,<sup>2</sup> and the fact of election as alderman does not vacate a councillorship.<sup>3</sup>

The governing body is completed by the election of the mayor, immediately after the election of aldermen, also by the councillors, each of whom has one vote, which he exercises openly in writing. No councillor may vote for himself. The elected mayor must be either a councillor or an alderman, he holds his office for one year, is eligible for re-election with his own consent, and, if a councillor, holds his seat on the council till the 1st November after the expiry of his mayoralty.<sup>4</sup> The chief function of the mayor is, of course, to preside over the meetings of the council. He is the first man in civic affairs, and by the Act is given a general precedence after members of the Legislative Council.<sup>5</sup> But the Act gives him also other special functions. It constitutes a separate commission of the peace for the town of Melbourne, with such additional area as the Governor shall approve,<sup>6</sup> and appoints the mayor *ex officio* a justice during his year of office and the following year.<sup>7</sup> In this capacity, with one or more other justices for the town, he is also authorised to appoint special constables, paid from the town fund.<sup>8</sup>

But besides these constitutional officials, provision is made for others, some elective, some appointed by the council. Of the former, the chief are the assessors and the auditors; of the latter, the town clerk, the treasurer, and the surveyor. The assessors, two for each ward, are to be elected on the 1st March in each year, from among the burgesses qualified for election as councillors, in the same manner as the councillors. But no

<sup>1</sup> §§ 24-28.

<sup>2</sup> § 49; *ante*, p. 54, and *post*, p. 61.

<sup>3</sup> On the other hand, it may prolong it. An alderman retains his seat on the council till the 1st November after his office of alderman expires.

<sup>4</sup> §§ 46-48.

<sup>5</sup> § 62.

<sup>6</sup> § 64.

<sup>7</sup> § 62.

<sup>8</sup> § 69.

These sections are repealed by 28 Vic. No. 267, § 2; cf. *post*, p. 61.

person who is actually a member of the council, or who is town clerk or town treasurer, can be elected.<sup>1</sup> The duties of the assessors are mainly to assist the alderman of the ward in the conduct of elections and the decision of disputed points.<sup>2</sup>

The auditors (two for the whole town) are elected at the same time, in the same way, from amongst persons of similar qualifications. They too hold office for a year, but are eligible for re-election.<sup>3</sup> The duties of the auditors are, briefly, to inspect and check the accounts of the corporate funds.<sup>4</sup>

The assessors and auditors, although not part of the corporate constitution, are in many respects like the constitutional officials. Like the mayor, aldermen, and councillors, they are liable to a fine if they decline to serve when elected, unless they can claim exemption on one of the following grounds—

1. Lunacy, imbecility of mind, deafness, blindness, or other permanent infirmity of body.
2. Age greater than 65 years.
3. Previous service (or payment of fine) in the same office during the preceding five years.
4. Membership of the civil service.
5. Being a full pay officer in the service of the Crown or the East India Company.<sup>5</sup>

Like them, they must accept office by taking the oath of allegiance and signing a declaration embodying their qualifications.<sup>6</sup> Like them, they forfeit their office on the happening of any one of the following conditions—

1. Bankruptcy, insolvency, or composition with creditors.
2. Absence for more than six calendar months (in the case of the mayor, two months) from the town, except on the ground of illness. [If an official forfeits his post through absence, he must pay the fine.]<sup>7</sup>

The town clerk is appointed to hold office during pleasure, and is practically the secretary of the corporation, though, as the corporation has no recorder, he probably acts as recorder also, but, of course, has no judicial power. He must be an attorney of the Supreme Court of New South Wales, the District Court of Port Phillip, or one of the superior courts of Great Britain or Ireland.<sup>8</sup> The duties of the treasurer (an annual official) and the surveyor appear from their titles. The treasurer is specially forbidden by the Act to pay money except for the

<sup>1</sup> § 33.

<sup>2</sup> §§ 23 and 17.

<sup>3</sup> § 34.

<sup>4</sup> § 95.

<sup>5</sup> § 54.

<sup>6</sup> §§ 53, 54.

<sup>7</sup> § 57.

<sup>8</sup> § 65.

purposes contemplated by the Act, or upon the order of the council, signed by three members and countersigned by the town clerk.<sup>1</sup> The town clerk and the treasurer may not be members of the council, and their offices may not be united in the same person. The council may appoint<sup>2</sup> any other officials whom it deems necessary, but their offices, like those of the town clerk, treasurer, and surveyor, are purely ministerial; they themselves are removable by the council, and their offices may be discontinued if deemed unnecessary.<sup>3</sup>

The methods of doing business prescribed by the Act are very simple, much, naturally, being left to the discretion of the corporation itself. The council is bound to meet for general business on the 9th of November, February, May, and August respectively, and at such other times as the mayor shall decide. Eight members of council may at any time insist on a meeting being summoned; but on all occasions except the quarterly meetings, only such business can be transacted as has been mentioned on the notice paper. For all purposes, except the passing of by-laws, a quorum of the council is to consist of one-third of the full membership, and questions are to be decided by a majority of those present, the mayor, or other presiding officer,<sup>4</sup> to have a casting vote.<sup>5</sup> The council may appoint committees of itself for general or special objects, but the acts of a committee must receive the approval of the council.<sup>6</sup> The council must print and publish annually their audited accounts.<sup>7</sup>

The actual powers and duties conferred on the corporation are interesting, as showing the views of the legislators of 1842. They may be divided into two classes, those which are of an instrumental character, and those which are the ultimate objects of the corporation's labours.

Amongst the first class, the financial provisions are very important. There is to be a "Town Fund," into which all receipts from general sources, such as market rents and tolls, fines and penalties, and town rates, are to be paid by the treasurer, and from which all payments for general purposes are

<sup>1</sup> § 97.

<sup>2</sup> § 97.

<sup>3</sup> § 65.

<sup>4</sup> If the mayor is absent the councillors must choose one of the aldermen present as chairman. If no alderman is present, then one of themselves. <sup>5</sup> § 93.

<sup>6</sup> § 94. The principal committees usually appointed are—Public Works, Health and Parks and Gardens, Finance, Market, Legislative, Hackney Carriages.

<sup>7</sup> § 67.

to be made. To supplement the receipts of the Town Fund, the corporation may levy an annual rate by a by-law upon the buildings within the town, to an amount not exceeding one shilling in the pound annual value,<sup>1</sup> such rate to be enforceable first against the occupier, and, failing him, against the landlord. Buildings which do not qualify their occupiers for enrolment as burgesses are to be exempted,<sup>2</sup> and an appeal against any rate is to lie to the next Quarter-Sessions, whose decision is to be final.<sup>3</sup> Moreover, the council are empowered to levy a special Police Rate, not exceeding sixpence in the pound, for the maintenance of the Town Police, and the proceeds of this rate are to be kept by the treasurer as a special Police Fund.<sup>4</sup> The council is also authorised to borrow money on the credit of the corporation, to an extent not exceeding altogether the amount of five years' average income, exclusive of the Police Rate, but Government aid is not to be pledged for such loans.<sup>5</sup> To enable it to perform its principal duties, the council is also authorised to make by-laws for the regulation of its own proceedings, for the conduct of the various elections connected with it, for the good rule and government of the town, and for the suppression of nuisances.<sup>6</sup> These by-laws may impose fines to the amount of ten pounds each, but two-thirds of the council must be present on the occasion of passing any by-law, and no by-law can come into force until it has been submitted to the Government for forty days without disapproval, and until a copy has been published for one week in a local newspaper.<sup>7</sup>

The ultimate objects of the corporation powers may be gathered from the enumeration of its instrumental powers. They are to secure the good government of the town and the suppression of nuisances. But, especially, the corporation is empowered to undertake certain specific duties. It is to take over the business of the Market Commissioners.<sup>8</sup> It is to undertake the lighting of the town, and for that purpose to levy a "Lighting Rate," not exceeding fourpence in the pound,

<sup>1</sup> This restriction was removed by 17 Vic. No. 23.

<sup>2</sup> This provision was altered by the 8 Vic. No. 12 and the 11 Vic. No. 17, but the result is much the same to the occupier.

<sup>3</sup> § 67.

<sup>4</sup> § 70. As to the fate of this provision, cf. *post*, p. 60.

<sup>5</sup> § 98. These powers were largely increased by the 17 Vic. No. 13, etc.

<sup>6</sup> A long list of these is given in the Act.

<sup>7</sup> § 91.

<sup>8</sup> §§ 71 and 72.

on the value of "tenements and other property" within the town and the lighting area, and liable to the other rates.<sup>1</sup> It is to undertake the making and repair of the streets,<sup>2</sup> and the making and management of the drains and sewers.<sup>3</sup> It is empowered to construct waterworks and supply water, but no one is to be compelled to take the corporation water.<sup>4</sup>

Finally, any offence against the Act, or against any corporation by-law, may be enforced in a summary way before a justice of the peace, who, in default of payment of the prescribed penalty, may imprison the offender for a period not exceeding three months. In cases involving payment of more than five pounds, there is to be an appeal to Quarter-Sessions.<sup>5</sup>

A very slight acquaintance with the history of municipal government in England will convince any one of the source from which the provisions of the Melbourne Corporation Act were derived. After being for many centuries in a state of hopeless anomaly and confusion, the municipal corporations of England were at length placed upon an uniform and orderly footing by the great Municipal Reform Act of 1835 (5 & 6 Will IV. c. 76), passed by that Reformed Parliament the appearance of which had been so long delayed by the reactionary influence of the borough-system itself. It was one of the signal revenges of history, but we are here only concerned with its special influence on Melbourne. The resemblances between the Imperial Act of 1835 and the Melbourne Corporation Act are too striking to escape notice. They may be tabulated thus—

1. Style and qualifications of governing body (§§ 24, 25).<sup>6</sup>
2. Requirement of seven-mile limit of residence (§ 9).
3. Mode of making up and revising Burgess Roll (§§ 18, 22, 23).
4. Form of questions at elections (§ 34).
5. Duties of auditors and other officials (§ 37).
6. Relation of executive officials to the council (§§ 58-60).
7. Compulsory character of municipal office (§ 51).
8. Disqualifications for office (§§ 52-56).
9. Position of mayor as justice for the borough (§ 57).
10. Appointment by him of special constables (§ 83).
11. Process of summoning meetings of council, and proceedings thereat (§ 69).

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<sup>1</sup> §§ 74-79.

<sup>2</sup> §§ 80-85.

<sup>3</sup> § 86. See, for additional powers under this head, 16 Vic. No. 38 (Vic.)

<sup>4</sup> §§ 87-90.

<sup>5</sup> §§ 100-107.

<sup>6</sup> These references are to the sections of the English Act.



12. Lighting powers (§ 88).
13. Process of making by-laws (§ 90).
14. Provision for borough fund and rate, with appeal to Quarter Sessions (§ 90-93).

The main differences between the two systems are easily accounted for by the differences between English and colonial history. They are as follows—

1. In the English Act the municipal franchise belongs to all householders (§ 9). In Melbourne it was confined to £25 resident occupiers. This is easily accounted for by the recent agitation in England, and by the ancient theory of "scot and lot."
2. In the English Act the appointment of *ordinary* constables is vested in the mayor and Watch Committee (§ 76). Police had always been a local matter in England, in New South Wales it was one of the chief concerns of the central government, and, as we shall see, even the local powers given by the Melbourne Act were held in abeyance.
3. The English Act provides for the continuance (§§ 118-123) of the ancient borough courts. There never had been any corresponding institutions in New South Wales.
4. By the Melbourne Act far wider scope is given to the corporation than in England, in the matters of
  - a. Sewers.
  - b. Streets.
  - c. Water-supply.
  - d. Markets.

These matters in England were already in the hands of independent bodies or individuals, some of them of great antiquity.

The Melbourne Corporation Act was supplemented in the same year by a Money Act (6 Vic. No. 8, N. S. W.), appropriating the fees taken in the Melbourne police office to the corporation Police Rate, and empowering the Governor to set aside annually, out of the general revenue of the colony, a sum not exceeding £1500 to match an equal sum to be raised by the corporation for the Police Rate, and a sum not exceeding £2000 to match an equal amount to be raised for the Town Fund. The Police Rate must have been levied by the corporation for at least a year, for the 9 Vic. No. 19 (N. S. W.) directs that a surplus in the Police Fund for the municipal year ending 1st November 1844 shall be paid over to the credit of the Town Fund, but the police powers, after being annually suspended from the year 1845 to the year 1852,<sup>1</sup>

<sup>1</sup> Statutes 8 Vic. No. 11, 9 Vic. No. 17, 10 Vic. No. 5, 11 Vic. Nos. 6 & 51, 13 Vic. No. 23, 14 Vic. No. 21, and 15 Vic. No. 2.

seem never to have been acted upon since the introduction of separate government.<sup>1</sup> The sections of the Incorporation Act providing for a separate commission of the peace for Melbourne, and the appointment of constables<sup>2</sup> were repealed, except as to the precedence of the mayor, by the Local Government Act of 1865, which constituted the mayor *ex officio* a justice of the peace "for Victoria," but restrained him from sitting except within the corporation limits.<sup>3</sup> This provision was further altered by the 51 Vic. No. 953, which constitutes him<sup>4</sup> a justice for every bailiwick in which any part of the city area is included.

Several minor alterations have also been made in the constitution and powers of the corporation. By letters-patent of 25th June 1848 the town of Melbourne was converted into a city, and thereupon took<sup>5</sup> for its corporate title "The Mayor, Aldermen, Councillors, and Citizens of the City of Melbourne." Additional wards and aldermen were constituted by proclamation in 1856 and 1869, the boundaries of the town having been previously extended by the 8 Vic. No. 12. The control of the corporation over hackney-carriages was extended to a radius of eight miles by the 14 Vic. No. 3, and its powers in the matter of drainage increased by the 16 Vic. No. 38,<sup>6</sup> but its powers with regard to the construction of waterworks and supply of water were abolished by the Public Works Statute 1865.<sup>7</sup> By the 27 Vic. No. 178<sup>8</sup> the following disqualifications for the office of councillor or alderman were added—

1. Attaint of treason or conviction of felony or any other infamous offence.
2. Personation or procuring of personation at any municipal election.

By the 49 Vic. No. 567<sup>9</sup> the election of councillors for Melbourne is placed on the same footing as those of boroughs and shires under the Local Government Act 1874.<sup>10</sup> The

<sup>1</sup> During the recent strike, the Mayor of Melbourne enrolled a number of "special" constables. But their services were given gratuitously.

<sup>2</sup> §§ 62-64.

<sup>3</sup> 28 Vic. No. 267, §§ 2 & 6.

<sup>4</sup> § 14.

<sup>5</sup> Under the 13 Vic. No. 14.

<sup>6</sup> Cf. also the 16 Vic. No. 39, incorporating the "Commissioners of Sewers and Water Supply," and making the mayor of Melbourne *ex officio* a member.

<sup>7</sup> 29 Vic. No. 289.

<sup>8</sup> § 33.

<sup>9</sup> § 6 (repealing 11 Vic. No. 17, § 2, and 27 Vic. No. 178, § 3).

<sup>10</sup> 38 Vic. No. 506.

scheme of incorporation was extended to the town of Geelong in the year 1850 by the 13 Vic. No. 40, and most of the alterations in the Melbourne scheme include that of Geelong also.

The importance of the corporation of Melbourne in Victorian history has been great. It is by far the oldest surviving institution of any magnitude. Created on a very advanced model at a time when everything around it was in a most primitive condition, it must have exercised a great effect on the political ideas of the community. Its existence served emphatically to affirm the principle that Victoria is a country developed through the towns. The practical success of the corporation of Melbourne would contrast markedly with the failure of the ambitious Local Government scheme of 1842, and on that account would serve as a model for future efforts. There can be little doubt that the predominance of town-life in Victoria is pregnant with the germs of grave social danger, but it is easy to see how that predominance has arisen.

## CHAPTER VII

### GENERAL CONDITION OF PORT PHILLIP IN 1842

THIS book does not profess to give a general history of Victoria. It deals only with the history of government. Nevertheless, to prevent our study being too abstract, we shall do well to glance occasionally at the general condition of the colony. And this course will also enable us to form some estimate of the merits of the scheme of government for the time being. Political machinery is largely a matter of accordance with environment.

From the estimates submitted by the Governor to the Legislative Council of New South Wales in the year 1842,<sup>1</sup> we find that the official staff at Port Phillip then consisted of the following functionaries—

1. The Superintendent (with clerks and messengers).
2. The Sub-Treasurer (with clerks and messengers).
3. The Customs staff (two sub-collectors at Melbourne and Portland, one landing-surveyor, two landing-waiters, three clerks, two lockers, one coast-waiter and five tide-waiters, a revenue cutter, and four Customs boats at Melbourne, Williamstown, Geelong, and Portland).
4. The Postmaster and staff (the latter consisting of two clerks and two letter-carriers).
5. The survey staff (including two surveyors, five assistant-surveyors, and two draftsmen).
6. The Clerk of Public Works and four overseers.
7. The ecclesiastical staff<sup>2</sup> (one clergyman of the Church of England, two Presbyterian ministers, one Wesleyan minister, and one Roman Catholic clergyman).
8. The medical staff<sup>2</sup> (two assistant-surgeons).
9. The judicial and legal staff, consisting of—
  - a. The Resident Judge.

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<sup>1</sup> To be found in *Votes and Proceedings* (N. S. W.), 1842, p. 345.

<sup>2</sup> At this time maintained by the central government.

- b. The Clerk of the Crown.
- c. The Crown Solicitor and Clerk of the Peace.
- d. The Deputy-Registrar.
- e. The Deputy-Sheriff.
- f. Two Commissioners of Requests (Melbourne and Geelong).
- g. The Coroner.
- h. Subordinate officials.
- 10. Police establishments :—
  - a. Melbourne. (In hands of corporation, under 6 Vic. No 7.)
  - b. Williamstown. (Watch-house keeper and two constables.)
  - c. Geelong. (Police magistrate, clerk, chief constable, district constable, two watch-house keepers, five ordinary constables, and scourger.)
  - d. Portland. (do.)
  - e. The Grange. (Police magistrate, district and ordinary constable.)
  - f. Port Fairy. (do.)
  - g. Grampians and Pyrenees. (do.)
  - h. Goulburn or Broken River. (do.)
  - i. Water Police. (Superintendent, clerk, inspector, four constables, two coxswains, and crew of six men.)
  - j. Mounted Police. (Two sergeants, two corporals, eighteen mounted and two dismounted troopers.)
  - k. Border Police.<sup>1</sup> (Four Commissioners,<sup>2</sup> two sergeants, two constables, and four corporals.)
  - l. Native Police. (Superintendent, assistant, and sergeant.)
- 11. The Gaol. (Gaoler, clerk, three turnkeys, and messenger.)

The estimated total cost of these establishments at Port Phillip for the year 1843 was £74,237 : 16 : 3, which included the sums to be granted to the corporation of Melbourne in aid of the Police Rate and Town Fund.<sup>3</sup> Of this total sum £16,000 (odd) was appropriated to the police establishments, about £5000 to the administration of justice, and about £1700 to the gaol, making a sum of about £23,000, or nearly one-third of the total expenses of Port Phillip, to be spent upon the maintenance of order and the settlement of disputes. The estimates for 1843 were far less than the actual expenditure of 1842, which had amounted to £85,000.<sup>4</sup>

<sup>1</sup> Under the 2 Vic. No. 27 (cf. *ante*, p. 46), amended by the 5 Vic. No. 1.

<sup>2</sup> Two of these were only occasional.

<sup>3</sup> Under the 6 Vic. No'7, *ante*.

<sup>4</sup> These and the following figures are from the returns submitted by the governor on the 22d August 1843 to the Legislative Council, in pursuance of an Address of the 17th August previous. (See *Votes and Proceedings* (N. S. W.), 1842, p. 461.)

Against these expenses the revenue from all sources for the same year (1842), except the great source of the sale of Crown lands, had been something over £84,000, or a deficit of about £1000 on the expenditure. On the other hand, in the year 1841 the revenue had considerably exceeded the expenses. On the whole, however, from its foundation in 1836 to the 24th April 1843 the settlement cost about £32,000 above its ordinary revenue. But this deficiency was counterbalanced by the fact that the proceeds of the sale of Port Phillip lands during the same period had amounted to very nearly £400,000,<sup>1</sup> of which only about £200,000 had been spent in assisting emigration to the settlement, whilst its public works had been provided for by the ordinary expenditure. Thus the community starts on its second period of existence with a balance of nearly £200,000 to its credit.

Passing beyond the statistics of government, we find that at the close of the year 1842 the population of Port Phillip District amounted to 23,799,<sup>2</sup> of whom 15,691 were males and 8108 females, while of the total number about 5000<sup>3</sup> were dispersed in the squatting districts beyond the boundaries of location, principally in the districts of Monaroo, Murray, Western Port, and Murrumbidgee (which was then included in Port Phillip). The only counties proclaimed were those of Bourke, Grant, Normanby, and Auckland, the latter now belonging to New South Wales. The amount of Crown lands which had been alienated was 226,632 acres,<sup>4</sup> but of this only 8124 acres were under cultivation. Of the cultivated area 2432 acres were in wheat, yielding 55,360 bushels; about the same quantity in oats, yielding 66,100 bushels; 761 acres in barley, yielding 20,025 bushels; 68 acres in maize, yielding 1360 bushels; and 1419 acres in potatoes, yielding just 6000 tons. The remainder grew hay, producing 2300 tons. The

<sup>1</sup> *Votes and Proceedings* (N. S. W.), 1843, p. 463.

<sup>2</sup> The following figures (unless otherwise stated) are taken from the Victorian Year-Book 1886-87, by the Victorian government statist, Mr. H. H. Hayter, C.M.G.

<sup>3</sup> Cf. map of squatting districts, *Sess. Papers* (H. of Lords), 1845, vol. vi. pt. i. p. 398.

<sup>4</sup> Most of this appears to have been in the Barrabool country, on the Yarrow and Moorabool rivers, and north of Melbourne, on the Yarra, and the Merri and Darebin creeks. Cf. map in *Sessional Papers* (H. L.), 1841, vol. v.

year 1841 had grown 1440 cwt. of tobacco, but the experiment seems to have been given up in 1842.

The community possessed about a million and a half head of live stock, divided thus: horses, 4605,<sup>1</sup> cattle, 100,792, pigs, 3041, and sheep, 1,404,333. Of this stock by far the largest portion, amounting to 1,300,000 head, were in the squatting districts.<sup>2</sup>

The shipping in the ports during the year 1842 had been about 230 vessels, with a gross tonnage of about 40,000. The exports for the year had amounted to the value of £198,783, the principal being: wool (2,828,784 lbs., value £151,446), tallow (78,400 lbs., value £975), and hides (value £801). The imports, principally of bread-stuffs, amounted in value to £277,427. The capital invested during the year in mortgages and loans was £113,262. Along the road between Sydney and Melbourne, by the Yass plains and Gippsland, villages had been laid out and police stations formed.<sup>3</sup>

<sup>1</sup> The *Year-Book* says 4065, but this is probably a misprint. Cf. the original returns in *Votes and Proceedings* (N. S. W.), 1843, p. 473.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Sess. Papers* (H. L.), 1841, vol. v. p. 8.

## **PART II**

### **REPRESENTATIVE GOVERNMENT**





## CHAPTER VIII

### THE NEW CONSTITUTION

THE Act for the Government of New South Wales and Van Diemen's Land (5 & 7 Vic. c. 76) seems to have passed the Imperial Parliament without exciting the smallest interest. It is with difficulty that we can trace its progress in the pages of Hansard. What small amount of attention was in 1842 given to colonial matters seems to have been divided between the Crown lands question, the financial embarrassments of South Australia, and the grievances of Newfoundland. The English public had other matters to think of. The great Corn Law agitation was preluding to its final triumph. The ever-present Irish question was in a particularly acute state. A war with China was just over, a war in North-western India was raging, and a war in South Africa was impending. There was much industrial distress. Sir Robert Peel was just about to revive the unpopular income-tax. In Scotland the great theological convulsion which resulted in the secession of the Free Church was agitating the country.

Nevertheless, unnoticed as it was in England, the Constitution Statute of 1842 was of great importance in the history of Australia. Its chief claim to distinction, from a constitutional point of view, is that it introduced into Australia the principle of representation for purposes of central government. But it was in other respects also a very important statute.

It begins by providing for a Legislative Council of thirty-six members, twenty-four to be elected in the colony of New South Wales,<sup>1</sup> and the remaining twelve to be appointed by the

<sup>1</sup> By the 53d section the old form of government is continued for Van Diemen's Land.

Crown.<sup>1</sup> The local legislature may increase the total numbers of the Council, but the proportion between elective and nominee members is always to be preserved.<sup>2</sup>

In the same way, the distribution of the representatives and the boundaries of the electoral districts are to be settled by the existing Council, but the District of Port Phillip, and the towns of Sydney and Melbourne, are each to be an electoral district. For the purposes of the Act, the boundary of the District of Port Phillip on the north and north-east is to be "a straight line drawn from Cape How to the nearest source of the River Murray, and thence the course of that river to the eastern boundary of the province of South Australia."<sup>3</sup> The electoral boundaries of Sydney and Melbourne, and of all other towns which may be made electoral districts under section 2, are to be fixed by the Governor, by letters-patent or proclamation.<sup>4</sup>

The electoral franchises are two; first, the ownership in possession of a freehold estate within the electoral district of the clear value of two hundred pounds, second, the occupancy of a dwelling-house within the district of the clear annual value of twenty pounds.<sup>5</sup> The qualification must be of six months' standing, and all rates and taxes payable in respect of such ownership or occupancy, except such as have accrued within three months, must have been paid.<sup>6</sup>

The elected candidates must be qualified by the seisin (legal or equitable) of a freehold estate, within the colony, of the annual value of one hundred pounds, or the capital value of two thousand pounds, clear in both cases.<sup>7</sup>

Both electors and candidates must be males of full age, natural-born or naturalised subjects,<sup>8</sup> and no person who is undergoing a sentence for attain or conviction of treason, felony, or infamous crime within British Dominions, is entitled to vote.<sup>9</sup>

The nominee members of the Council may be appointed either by royal warrant, countersigned by a Secretary of State,

<sup>1</sup> § 1.

<sup>2</sup> § 4.

<sup>3</sup> § 2. Note the difference between this boundary and that fixed by the Land Regulations of 5th December 1840 (*ante*, p. 40). The change was evidently due to remonstrance from Sydney. (Cf. corresponded in *V. and P.* (Victoria), 1853-54, vol. ii. p. 735, etc.)

<sup>4</sup> § 3.

<sup>5</sup> § 5.

<sup>6</sup> § 7.

<sup>7</sup> § 8.

<sup>8</sup> An elector is qualified also if he is a denizen (§ 6).

<sup>9</sup> § 6.

and this warrant may either describe them by their names or by their official titles, or the Crown may delegate the power of making the appointments to the Governor, to be exercised in like manner, but the Governor's appointments are to be only provisional, and are not to be made until the return of all the elective writs.<sup>1</sup> Not more than half of the nominee members may hold paid office under the Crown in the colony.

The grounds upon which a seat becomes vacant are as follow—

1. Resignation (by letter addressed to the Governor).<sup>2</sup>
2. Failure to attend for two sessions without permission of the Governor signified to the Council.
3. Adherence to or becoming a subject of any foreign state or power.<sup>3</sup>
4. Bankruptcy, or insolvency.
5. Attaint of treason or conviction of felony or other infamous crime.
6. Insanity.<sup>4</sup>
7. Vacation of office (by a nominee member nominated as the holder of such office).<sup>5</sup>

All questions as to the existence of vacancies are to be settled by the Council itself.<sup>6</sup>

The places and times of holding the meetings of the Council are to be fixed by the Governor, but there is to be a session at least once every year, with an interval of not more than twelve months between any two, and each Council is to continue for five years unless sooner dissolved by the Governor.<sup>7</sup>

The Council is to elect a Speaker (subject to the Governor's disallowance),<sup>8</sup> and to adopt Standing Orders which, upon the approval of the Governor, will become binding on the Council, subject to disallowance by the Crown in the same way as other legislation.<sup>9</sup> The Council cannot transact business unless one-third of its members are present, exclusive of the Speaker; all matters are to be decided by a majority of those present, the Speaker having a casting, but not an ordinary vote.<sup>10</sup>

The Governor, with the advice and consent of the Legislative Council, is to have authority to "make laws for the peace,

<sup>1</sup> § 12.

<sup>2</sup> § 15.

<sup>3</sup> This is almost the same thing as alienage, but not quite. It leaves the question of the right in the Crown to claim the allegiance of the person in question undecided.

<sup>4</sup> § 16.

<sup>5</sup> § 17.

<sup>6</sup> § 18.

<sup>7</sup> §§ 20, 21.

<sup>8</sup> § 23.

<sup>9</sup> § 27.

<sup>10</sup> § 24. It was afterwards provided (by 6 Vic. No. 16, § 57, p. N. S. W.) that the Council might proceed to business after an election, notwithstanding the failure of two returns.



welfare and good government of the said colony," with two great restrictions, viz.—

1. No such law is to be repugnant to the law of England.
2. No such law is to interfere in any manner with the sale or other appropriation of the lands belonging to the Crown within the colony, or with the revenue thence arising.<sup>1</sup>

The Governor is to have power to submit the drafts of any proposed bills to the Council, and to suggest any amendments in bills sent up by the Council, and his drafts and amendments must be regularly considered.<sup>2</sup> Every bill presented to the Governor for the royal assent may be either assented to, refused, or reserved by him, in accordance with the directions of the Act or his Instructions, where the case is provided for in either, or at his own discretion, if there be no such provision.<sup>3</sup> The Act provides that certain bills shall be in every case reserved by the Governor, unless they be of a temporary character, and declared by the Governor to be necessary on account of some public and pressing emergency. These bills which must be reserved are—

1. Bills altering the electoral districts, or the number of members returned by them, or the whole number of the Council.
2. Bills altering the salaries of the Governor, Superintendent, or any of the judges.
3. Bills affecting customs duties.<sup>4</sup>

A bill so reserved does not come into force in the colony until and unless, within two years from its presentation to the Governor, the latter signifies the royal assent by speech in or message to the Legislative Council, or by proclamation.<sup>5</sup> But, besides this check, the Crown reserves the right of disallowing, within two years of its receipt by the Secretary of State, any bill assented to by the Governor, and thereupon, upon similar notification in the colony, the Act becomes void as from the date of the notification.<sup>6</sup>

The revenue clauses of the Act are also very important. In the first place we have seen that the Council cannot pass any law interfering with the sale or appropriation of Crown lands and the revenue thence arising. Moreover, by common law, the

<sup>1</sup> § 29.

<sup>2</sup> § 30. This is strictly in accordance with English precedent, except that in England the Crown acts through its Ministers.

<sup>3</sup> § 31.

<sup>4</sup> § 31.

<sup>5</sup> § 33.

<sup>6</sup> § 32.

Council could not levy any tax on Crown lands or other Crown property, for this would be to make a grant to Her Majesty of her own money.<sup>1</sup> And finally, as we have seen,<sup>2</sup> any Customs Bill requires special reservation for the royal assent. But, subject to these exceptions, the Governor and Council seem to have power (though only by implication) to raise any kind of taxes and to any amount that they please. But a powerful check is laid on possible extravagance of the Council by the introduction of the good English constitutional rule, that no money can be voted for any purpose by the legislature, unless it is expressly asked for by the Executive.<sup>3</sup> This brings us to the important appropriation clauses of the statute, which enact that all the taxation revenue of the colony shall be appropriated to the public service within the colony, in manner determined by legislation.<sup>4</sup> But this general direction is limited by two special clauses, one of which is very important.

The first<sup>5</sup> subjects the revenue to the charges and expenses of collection. This stipulation is obvious and reasonable, especially as the control of the collection is placed entirely in the hands of the local legislature.

The second<sup>6</sup> charges upon the revenue a permanent Civil List of £81,000 a year payable to the Governor without special vote, the object being, of course, to secure the independence of the colonial executive. But as the whole of this sum does not stand on the same footing, it will be necessary to go slightly into details.

The sum of £81,000 a year is divided between three different objects, dealt with by the statute under three separate schedules, A, B, C. Schedule A reserves a sum of £33,000 for the salaries of the Governor, the Superintendent at Port Phillip, the judges, the law officers, and the expenses of the administration of justice. These salaries are alterable only by Act of the Council specially reserved for the royal assent.<sup>7</sup> Schedule B reserves a sum of £18,600 for the political officials of the colony, the Chief Secretary, the Treasurer, the Auditor-General, and their departments, but the sums thereby

<sup>1</sup> This action is expressly forbidden to the contemplated local councils by section 43, but it is equally beyond the power of the central legislature. Of course there is no legal objection to taxing the *occupiers* of Crown property.

<sup>2</sup> *Ante*, p. 72.

<sup>3</sup> § 34.

<sup>4</sup> § 34.

<sup>5</sup> § 36.

<sup>6</sup> § 37.

<sup>7</sup> § 38.

appropriated are variable at the pleasure of the Governor,<sup>1</sup> and, moreover, within thirty days after the commencement of the session the Governor is to lay before the Council detailed estimates of the amounts required for the ensuing year from the sum reserved by schedule B, for the purposes therein mentioned.<sup>2</sup> About the sum reserved by schedule C (Public Worship) the Act is silent, but as the Governor is entitled to receive annually the total amount of the sums reserved by the three schedules from the Treasurer without special vote,<sup>3</sup> and as he is accountable for their expenditure to the Home Government,<sup>4</sup> presumably the appropriation for Public Worship is placed, by the strict law, entirely in his hand. But as the requirements for Public Worship very soon increased beyond the limits of the sum provided by schedule C, it seems to have become the practice for the Governor to include details of that department in his estimates.<sup>5</sup> The actual expenditure of the revenue is to be only by warrants of the Governor directed to the Treasurer;<sup>6</sup> but this is mere machinery, leaving the duty of each official, to see that the share he takes in the expenditure is warranted by law, quite untouched.

Leaving the important sections relating to municipal government for discussion in a separate chapter, we may note finally the clauses of the statute relative to the constitution of new colonies.

Her Majesty is empowered, by Letters-Patent under the Great Seal, to define the limits of the colony of New South Wales and "to erect into a separate colony or colonies, any territories which now are, or are reported to be, or may hereafter be comprised within the said colony of *New South Wales*: Provided always that no part of the territories lying southward of the Twenty-Sixth Degree of South Latitude in the said Colony of *New South Wales* shall by any such Letters-Patent as aforesaid be detached from the said Colony."<sup>7</sup> In any such newly erected colony Her Majesty may create a Legislative Council of nominees, not less than seven, which shall, under the Instructions of the Crown, have power to legislate for the peace, order, and good government of the colony, both Instructions and legislation being not repugnant to English law, and being

<sup>1</sup> § 38.<sup>2</sup> § 39.<sup>3</sup> § 37.<sup>4</sup> § 37.<sup>5</sup> Cf. (*e.g.*) *Voices and Proceedings* (N. S. W.), 1843, pp. 409, 410.<sup>6</sup> § 35.<sup>7</sup> § 52.

subject to the review of the Imperial Parliament.<sup>1</sup> The limits of the 26th degree of south latitude excluded the operation of the 52d section in any territory lying south of Moreton Bay, which embraced what was, in 1842, the Moreton Bay District itself, with the town of Brisbane, the colony of New Zealand, and the colony of Van Diemen's Land, but, of course, do not interfere with future subdivision of such territories by new legislation. All such provisions of the 9 Geo. IV. c. 83<sup>2</sup> and its continuing and amending Acts<sup>3</sup> as are not inconsistent with the new scheme are made permanent.<sup>4</sup> The most important of these provisions are those relating to the administration of justice.

The two great objects of the Act of 1842 were the introduction of representative government for central and for local purposes. With the latter we shall deal in a future chapter, the scope of the former may be here briefly summarised.

The Act creates a colonial legislature, variable in size and distribution (subject to the veto of the Crown) according to the need of circumstances, but with a fixed proportion of two-thirds of elective members to one-third of nominees. The qualifications of the elective members and their electors are fixed by the statute, but these may be freely altered by the colonial legislature. The nominee members are actually appointed by the Home government, although the process of appointment passes through the hands of the Governor. One object of the nominee reserve is obviously to secure the presence in the legislature of certain high government officials, but this policy is limited to the appointment of one-half of the nominee members. The object secured by the nomination of the other half is probably the permanent presence in the legislature of men of experience and substance who, for some reason, do not care to face an election. Taken altogether, the nominee members are to form the permanent and aristocratic element in the council.

But it must be carefully noted, that while the official members of the council undoubtedly will bring the executive

<sup>1</sup> § 52. This section is practically a reproduction of the 3d section of the 3 & 4 Vic. c. 62, the Act under which New Zealand had been constituted a separate colony.

<sup>2</sup> *Ante*, pp. 14-17.

<sup>3</sup> 6 & 7 Will IV. c. 46, 1 Vic. c. 42, 1 & 2 Vic. c. 50, 2 & 3 Vic. c. 70, 3 & 4 Vic. c. 62.

<sup>4</sup> § 53 of 5 & 6 Vic. c. 76.



into closer relations with the representative body, the latter is given absolutely no direct control over the former. On the contrary, the independence of the executive is secured by the guarantee of the permanent Civil List, which the Governor is empowered to draw without vote, and which is sufficient at least to maintain the barely necessary machinery of government without support from the Council. Similarly the legislature is given no control over the administration of justice. The old Executive Council and the old Supreme Court are absolutely untouched. On the other hand, the legislature can, indirectly, to a certain extent affect both the executive and the judiciary. By questioning officials in the Council, by demanding papers and accounts, by refusing to vote increased grants, it can seriously hamper the action of the executive and the judges. It is worth the latter's while to keep on good terms with the Council. Thus there is every incentive to harmony, while, at the same time, the possibility of discord is not averted. But there are sometimes worse things in an administration than discord.

## CHAPTER IX

### INAUGURATION OF THE NEW CONSTITUTION

THE Act of 1842 provided that it should be proclaimed by the Governor within six weeks after his receipt of a copy, and that it should take effect within the colony from the day of the proclamation. The Governor received a copy of the statute on the 1st January 1843, and proclaimed the Act on the 5th.<sup>1</sup> But much remained to be done before the scheme could be put into operation, and the Act itself obviously contemplated delay when it provided <sup>2</sup> that the powers of the existing Council should continue until the actual issue of the writs for the new body.

Accordingly, on the 24th January 1843, the old Council met, for its last session, to make the necessary preparations for the inauguration of its successor.<sup>3</sup> On the 23d February the governor gave his assent to an Electoral Act which regulated the preliminaries. On the same day the old Council adjourned *sine die*, and did not again meet.<sup>4</sup>

The Electoral Act (6 Vic. No. 16, N. S. W.) divided the colony of New South Wales into eighteen electoral districts, of which one was the District of Port Phillip,<sup>5</sup> twelve were county constituencies in New South Wales proper,<sup>6</sup> and five town constituencies,<sup>7</sup> all, with the exception of Melbourne, within New South Wales proper. There were six single-county constituencies and six groups, three single town-

<sup>1</sup> *Gov. Gazette* (N. S. W.) 5th Jan. 1843. The Act had received the royal assent on the 30th July 1842. England and Australia were then a long way apart.

<sup>2</sup> § 53.

<sup>3</sup> *Votes and Proceedings* (N. S. W.), 1843, p. 1 } (Part I.)

<sup>4</sup> *Do.*, p. 12.

<sup>5</sup> § 1.

<sup>6</sup> § 1.

<sup>7</sup> § 2.

constituencies (Sydney, Melbourne, and Parramatta) and two groups.<sup>1</sup> The District of Port Phillip was to return five members,<sup>2</sup> the county of Cumberland and the town of Sydney two each, all the other constituencies one each.<sup>3</sup> The county constituencies comprised only land within the limits of location.<sup>4</sup> The towns having special representation of their own were excluded from the county constituencies.<sup>5</sup> The boundaries of certain counties had already been fixed; those of the others were to be settled, for the purposes of the Act,<sup>6</sup> by proclamation.<sup>7</sup>

The Mayors of Sydney and Melbourne are to be returning officers for their own towns, unless they object,<sup>8</sup> in other cases returning officers are to be appointed by the Governor from amongst the electors.<sup>9</sup>

There are to be four classes of polling-places, with their

<sup>1</sup> § 2.

<sup>2</sup> § 1.

<sup>3</sup> *Ibid.* (Sydney and Melbourne only by recital.)

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* The result of the Act is to group the constituencies thus—

*District.*—Port Phillip. 5 members.

<i>Counties.</i>	<i>Towns.</i>
Cumberland, 2	Parramatta, 1
Northumberland, 1	
Camden, 1	“Cumberland { Windsor
Argyle, 1	{ Richmond
Durham, 1	{ Campbelltown } 1
Bathurst, 1	{ Liverpool
St. Vincent } 1	“Northumberland { East Maitland
Auckland } 1	{ West Maitland } 1
Murray } 1	{ Newcastle
King } 1	
Georgiana } 1	
Cook } 1	
Westmoreland } 1	
Roxburgh } 1	
Phillip } 1	
Wellington } 1	
Gloucester } 1	
Macquarie } 1	
Stanley } 1	
Hunter } 1	
Brisbane } 1	
Bligh } 1	

<sup>6</sup> Note the limitation. It leaves the precise constitutional position of the new counties somewhat doubtful.

<sup>7</sup> § 3.

<sup>8</sup> We shall see that one of them, at any rate, did object.

<sup>9</sup> § 6: The returning officer must make a declaration before entering upon his duties (§ 60).

appropriate officials to draw up electoral lists, and decide upon questions arising therefrom, viz.—

1. In the towns of Sydney and Melbourne.—Each ward to be a polling-place, electoral rolls to be prepared by collectors appointed by the Mayor for each ward, and kept by the Town Clerks, Revision Courts of aldermen and assessors.<sup>1</sup>
2. In the town constituencies of the Cumberland and Northumberland Boroughs.—Each borough to be a polling-place, electoral rolls to be prepared by the Chief Constables, and Revision Courts to be held in each place of Petty Sessions having a clerk of the bench by the police magistrates or the senior resident magistrate, with the other magistrates as assessors.<sup>2</sup> The electoral lists to be sent to and kept by the returning officers.<sup>3</sup>
3. In other constituencies.—Each place for holding Petty Sessions, where there is a clerk of the bench, to be a polling-place, electoral rolls and Revision Courts as in the last instance.<sup>4</sup>
4. Where there are any deficiencies, not provided for in the first three instances, they are to be met by the appointment of the Governor.<sup>5</sup>

We may gather from these details what an important part the recently created corporations of Sydney and Melbourne would play in inaugurating the new constitution.

We now come to the process of election, and it will be well perhaps, for the sake of clearness, to trace the steps of the process in chronological order. They are as follow—

1. *The issue of the writs.* For the first election this was required to be within twelve months from the proclamation of the Constitution Statute,<sup>6</sup> in subsequent cases within twelve months from the dissolution of the last Council.<sup>7</sup> The writs are directed to the various returning officers, they name in each case the occasion of the election, the day for nomination of candidates, and for holding a poll if necessary,<sup>8</sup> and direct the officer to "return" the name of the person or persons duly elected. The writs are issued by the Governor.<sup>9</sup>
2. *Notice of the election by the returning officer.* This must be given within four days after receipt by him of the writ.<sup>10</sup>
3. *The meeting for nomination.* Held at the chief polling-place in the electoral district, under the presidency of the returning officer, on the day named in the writ. If no more candidates are nominated than there are vacancies, the returning officer declares the candidates nominated to be duly elected. If more are

<sup>1</sup> §§ 7, 8, 13, 14: Note the intimate connection thus created between the municipal and parliamentary elections.      <sup>2</sup> § 17.      <sup>3</sup> § 19.

<sup>4</sup> § 7.

<sup>5</sup> §§ 7 and 17.

<sup>6</sup> 5 & 6 Vic. c. 76, § 22.

<sup>7</sup> § 21.

<sup>8</sup> 6 Vic. No. 16, § 20.

<sup>9</sup> *Ibid.*

<sup>10</sup> § 28. By § 20 the day for the election must be fixed not less than 10, nor more than 30 days from the date of the writ.

nominated, the returning officer calls for a show of hands for each candidate, and declares the election thereupon "unless a poll be demanded by some one of the Candidates,<sup>1</sup> or by not less than six electors on his behalf." If a poll be duly demanded, the polling takes place from 9 o'clock till 4 at the various polling-places in the district, on the day fixed by the writ.<sup>2</sup>

4. *The Poll.* By signed voting papers, stating the place of the voter's qualifying property, handed to the returning officer by the voter.<sup>3</sup> If required by two electors, the returning officer must put any of the four following questions, or administer one or both of the two following oaths to a person claiming to vote :—

Questions—

- (i) Identifying signature upon voting paper.
- (ii) Identifying claimant with some person on the Electoral Rolls.
- (iii) Enquiring whether claimant has voted before at the election.
- (iv) Enquiring whether his property qualification described on the Roll still exists.

Oaths—

- (i) Affirming the answer to Question ii.
- (ii) Against bribery.<sup>4</sup>

5. *The Return.* The deputies at the minor polling-places (where such exist) seal up the voting papers received by them and deliver them to the returning officer.<sup>5</sup> The latter examines the votes, and at the place of nomination openly declares the result of the poll. In case of an equality the returning officer has a casting vote, but no officer or deputy may give an ordinary vote in his own polling district.<sup>6</sup> The returning officer then endorses the names of the successful candidates on the writ, and sends it to the Governor.<sup>7</sup> (This is the "return.") He also forwards, with the writ, the voting papers.<sup>8</sup>
6. *The completion of title to a seat.* Before taking his seat each newly elected member is required<sup>9</sup> to take a rather stringent oath or affirmation of allegiance to the Crown.

This concludes the proceedings at an ordinary election. But if the return is disputed, it becomes necessary to decide the dispute. The Electoral Act contains a rather remarkable scheme for such contingencies.

Within three days of the first meeting of the Council, the Governor is to nominate two persons, not being members of the Council, the Council itself is to elect two of its members, and

<sup>1</sup> ? "Some [one] of the Candidates."

<sup>2</sup> § 28.

<sup>3</sup> § 29.

<sup>4</sup> § 30.

<sup>5</sup> § 31.

<sup>6</sup> § 32.

<sup>7</sup> § 33.

<sup>8</sup> § 34.

<sup>9</sup> By the 5 & 6 Vic. c. 76, §§ 25 and 26. The declaration of property qualification is made prior to the election (§ 9).

the Chief-Justice is to name a barrister or advocate of five years' standing.<sup>1</sup> These five persons, when convened by the Governor,<sup>2</sup> form a court for the trial of election disputes, the Chief-Justice's nominee acting as president.<sup>3</sup> Their jurisdiction extends to all cases respecting disputed returns brought before them by the Governor,<sup>4</sup> but they are bound by the statements of the electoral rolls.<sup>5</sup> The parties bringing the complaint, who must be either a candidate or at least one-tenth of the voters on the roll of the district, present a petition to the Governor,<sup>6</sup> who refers the matter to the Electoral Court, and sends a copy of the petition to the Council.<sup>7</sup> The Court, which must deal with the merits of the case apart from technicalities,<sup>8</sup> regulates its own proceedings, but must pronounce a decision within five sitting days, and such decision is final.<sup>9</sup> The decision may reject the candidate returned, or seat a candidate not returned, or may declare the election void altogether, in which case a new writ is to be issued.<sup>10</sup> Bribery proved against a candidate disqualifies him from sitting in the Council till the next general election,<sup>11</sup> and the offences of bribery and personation are also made criminally punishable.<sup>12</sup>

This method of deciding election disputes was a striking improvement upon the corresponding scheme then at work in England. When the House of Commons in the seventeenth century finally wrested the right of deciding election questions from the Crown, they devolved its exercise upon committees of the whole House constituted *ad hoc*. With the development of the party system, these committees came to be elected on party lines, and the legal and political views of their members generally coincided in the most striking way. The defeat of a ministerial candidate on an election question, however weak his case, was the signal for the fall of his party in the House. Walpole resigned the reins of government, after having held them for thirty years, on the decision of the House upon the Chippenham election in 1742.<sup>13</sup> In the year 1770 a statute,<sup>14</sup>

<sup>1</sup> 6 Vic. No. 16 (N. S. W.), § 36.

<sup>2</sup> § 40.

<sup>3</sup> § 36.

<sup>4</sup> § 41.

<sup>5</sup> § 44.

<sup>6</sup> § 46.

<sup>7</sup> § 47.

<sup>8</sup> § 42.

<sup>9</sup> § 43.

<sup>10</sup> § 48.

<sup>11</sup> § 50.

<sup>12</sup> §§ 52-54.

<sup>13</sup> The Chippenham question was in form a dry point of law (cf. Hansard, 1st series, xii. 403). See also Mr. Bryce's account of a similar tendency in American politics in his *American Commonwealth*, i. 59, etc.

<sup>14</sup> 10 Geo. III. c. 16, amended by 11 Geo. III. c. 42 and 53 Geo. III. c. 71.

known as Grenville's Act, provided that whenever an election petition should be presented a committee of forty-nine members present in the House should be drawn by lot, which by alternate rejection of names by either party to the question should be reduced to thirteen, and these thirteen, together with two other members, chosen by petitioners and sitting members respectively, should act as a select committee to decide the dispute, being sworn to give judgment according to the evidence. This was practically the substitution of trial by special jury for trial by party; but the reform was not complete, for the party element was only reduced, not excluded, and in fact the scheme was abandoned after a trial of about a hundred years.<sup>1</sup> The method instituted by the Electoral Act of New South Wales was greatly superior, for it practically secured a majority of impartial judges, and rendered the tribunal independent of the Council, while at the same time it gave the latter body representation upon it. It would be interesting to know to whom the colony was indebted for the new idea.

The Electoral Bill having been duly passed, the work of carrying it out went on rapidly. On the 27th February 1843 the Governor proclaimed the electoral boundaries of the new counties,<sup>2</sup> on the 13th March those of the towns.<sup>3</sup> On the 30th May it was notified<sup>4</sup> that writs for the election of the members of Council had been issued. Notices of the elections were given by the various returning officers.<sup>5</sup>

For the five seats of Port Phillip District there were six candidates,<sup>6</sup> necessitating a poll. The nomination took place on the 13th June,<sup>7</sup> and the poll was held on the 20th.<sup>8</sup> It took three days to collect the papers, and the final result was declared on the 23d.<sup>9</sup> Sir Thomas Mitchell, the Government Surveyor, was rejected. The greatest publicity with regard to it is worth noting that the House of Commons preferred that the matter should be regulated by statute, though a standing order would have been competent.

<sup>1</sup> By the 31 & 32 Vic. c. 125, which gave the trial of election petitions to a rota (selected annually by themselves) of the judges of the three common-law courts.

<sup>2</sup> *Gov. Gazette* (N. S. W.), 28th February 1843.

<sup>3</sup> *Ibid.* 14th March.

<sup>4</sup> *Ibid.* pp. 738, 771, etc.

<sup>5</sup> *Port Phillip Patriot*, 15th June. *Port Phillip Herald*, 16th June, viz., Dr. Thomson of Geelong, Dr. Lang of Sydney, Sir Thomas Mitchell, Mr. Ebdon, Mr. Walker, Mr. Nicholson.

<sup>6</sup> *Patriot*, 26th June; *Herald*, 27th June.

<sup>7</sup> *Ibid.* 30th May.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

the voting prevailed. After the election the newspapers published a full list of the voters, showing how each had voted.<sup>1</sup> Objection was raised that three of the candidates had not been present at the election to declare their qualifications.<sup>2</sup>

The Melbourne election took place on the 15th June. The seat was contested by Mr. Edward Curr and Mr. Henry Condell, the Mayor of Melbourne.<sup>3</sup> There was a good deal of disturbance,<sup>4</sup> and special constables were sworn in.<sup>5</sup> Upon the majority of the questions before the electorate, such as immigration and separation, the candidates seem to have agreed, and the necessity for some point of doctrinal difference was supplied by the fact that their religious persuasions were different. There was a certain amount of rather poor ballad-mongering.<sup>6</sup> The poll was held on the 17th June, and resulted in a majority of 34 votes for Mr. Condell.<sup>7</sup> The total poll was 556. One of the most interesting episodes of the elections was an agitation by the squatters in favour of an extension of the franchise.<sup>8</sup>

Towards the end of June the official returns began to drop in,<sup>9</sup> and apparently by the 17th July all had been made.<sup>10</sup> The first meeting of the Council, to be held in the old Council Chamber in Macquarie Street, Sydney,<sup>11</sup> was fixed for the 1st August.<sup>12</sup> On the 18th July the Governor announced the names of the nominee members. They consisted of the Commander-in-chief, the Colonial Secretary, the Colonial Treasurer, the Collector of Customs, the Auditor-General, the Colonial Engineer, and six non-official members.<sup>13</sup> The Bishop of Australia (the see had not then been divided) was offered a seat by the Home government; but in terms which showed that Lord Stanley had grave doubts as to the propriety of an acceptance. The bishop took the same view, and declined the honour.<sup>14</sup>

<sup>1</sup> *Herald*, 23d and 27th June.

<sup>2</sup> *Patriot*, 22d June.

<sup>3</sup> *Ibid.* 17th June.

<sup>4</sup> *Ibid.* 5th and 19th June; *Herald*, 20th June.

<sup>5</sup> *Ibid.* 17th June.

<sup>6</sup> *Ibid.* 8th, 12th, 15th, 19th June; *Herald*, 17th and 20th June.

<sup>7</sup> *Ibid.* 19th June; *Herald*, 20th June.

<sup>8</sup> Advertisement in *Patriot*, 26th June.

<sup>9</sup> *Gov. Gazette* (N. S. W.), 1843, pp. 824, 837, 850, 865.

<sup>10</sup> *Ibid.* p. 921.

<sup>11</sup> The Governor had, however, already suggested the propriety of building new premises (*Votes and Proceedings*, 1843, p. 2).

<sup>12</sup> *Gov. Gazette* (N. S. W.), 1843, p. 863.

<sup>13</sup> *Ibid.* 18th July.

<sup>14</sup> See correspondence in *Votes and Proceedings*, 1843, p. 937.



On the 1st August the Council met for the first time.<sup>1</sup> The Governor was not present.<sup>2</sup> The Colonial Secretary read a commission empowering himself and two others to administer the oaths of allegiance, which were duly taken, the evidences of title (the letters-patent of the nominee members, and the returns to the election writs) being produced.<sup>3</sup> The Council then proceeded to the election of a Speaker. A contest between Mr. Alexander M'Leay and Mr. Edward Hamilton resulted in the election of the former by a majority of four votes.<sup>4</sup> On the next day the new Speaker, accompanied by members of the Council, was formally presented to the Governor and "not disallowed."<sup>5</sup> The Governor having announced his intention of opening the session in person, it was resolved to prepare him a suitable seat "without interfering with the seat of the Speaker."<sup>6</sup>

On the 3d August the Governor appeared and delivered a speech, to which a formal Address of thanks was voted. There was no debate on the Address itself, but the Council asserted its dignity by striking out the customary word "humble" from the motion. The Attorney-General then produced a commission appointing the two Government members of the Electoral Court, and also a letter from the Chief Justice naming the president. The Council then elected its two members, thus completing the Court.<sup>7</sup> On the 4th the *Gazette* announced the appointment of the Speaker and gave him special precedence next to the judges of the Supreme Court.<sup>8</sup> On the 5th the Governor's Proclamation convened the Electoral Court,<sup>9</sup> and on the 10th the Colonial Secretary informed the Council that the petitions against the returns for the Cumberland Boroughs and Melbourne had been referred to it. I have not been able to discover what became of these petitions, but apparently that against Mr. Condell's return failed, or was cured by the third section of the Imperial Act, 7 & 8 Vic. c. 74, which postponed the declaration of property qualification by a candidate till after the election of

<sup>1</sup> *Votes and Proceedings*, 1843, sub date.

<sup>2</sup> This is the vital point in the new Council's position. It has ceased to be a mere advising committee of the Governor, and has assumed an independent *status*. The Governor's visits are now only matters of ceremony.

<sup>3</sup> *Votes and Proceedings*, sub date.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; this was strictly following the words of § 23 of 5 & 6 Vic. c. 76.

<sup>6</sup> *Ibid.* 2d August 1843.

<sup>7</sup> *Ibid.* 3d August 1843.

<sup>8</sup> *Gov. Gazette* (N. S. W.) of that date.

<sup>9</sup> *Ibid.* 8th August.

the Speaker. At any rate the Mayor of Melbourne continued to sit and vote until his resignation in 1844.<sup>1</sup> It was not until the 27th October that the Council passed its Standing Orders, which were duly approved by the Governor.<sup>2</sup> They contain nothing very striking; perhaps the two clauses most interesting for our purpose are the 88th, which provides that in all private bills relating to Port Phillip, the evidence of service of notice required to be given to parties interested may be taken before the Resident Judge, whose certificate is to be admitted as proof, and the 94th, directing that every private bill shall contain a clause suspending its operation until it has received the royal assent.

In considering the machinery of the new Council one cannot help being struck with the minute resemblance which it bears, in most points, to the English machinery. It was natural perhaps that the English legislation should follow the old model, but the Colonial Electoral Act and the Standing Orders of the Council almost slavishly imitate their English precedents. The only important difference, undoubtedly an improvement, is in the mode of settling election disputes. Two reasons for the similarities, apart from the obvious reasons of kinship and political connection, may be pointed out.

One was the paucity of other models. Representative government is now such a common thing that we are apt to forget how young it is. In 1842 it existed strongly and obviously in England and America, strongly but obscurely in Scandinavia and Switzerland, and only weakly and tentatively in other European countries. It is not easy even now for an Englishman to find out much about the constitutions of Scandinavia. The constitution of Switzerland, renewed since 1842, has only just been made readily accessible to English readers. America has had, until recently, surprisingly little constitutional influence beyond her own borders, partly, perhaps, because until recently the literature on the subject has not been great.<sup>3</sup> But it is surprising to notice how America seemed to be entirely beyond the horizon of 1842.

<sup>1</sup> *Votes and Proceedings*, 1844 (1), p. 9.

<sup>2</sup> Copy in *Votes and Proceedings*, 1843.

<sup>3</sup> Tocqueville's great work had, in 1842, only recently been published, and perhaps had not reached Australia.

The other reason is the extreme rarity of political inventiveness. This reason is not always recognised, but it exists. I know of but two short periods in English history in which there has really been an abundance of political genius. And 1842 did not fall within either of them.

## CHAPTER X

### LOCAL<sup>1</sup> GOVERNMENT

CONTEMPORANEOUSLY with the introduction of the new constitution, two questions agitated the colony of New South Wales. One was the question of local government, the other the ever-important Land Question. Of these in their order.

It must never be forgotten that one of the greatest differences between the English and any Australian constitution is that the former has been built up, by a process of integration, from widely-spread local institutions, while the latter has evolved itself from a central authority. It is not at all surprising, therefore, that the English statesmen of 1842 should have thought it most important to introduce local institutions into the colony. It is equally natural that the colonists, whose circumstances and history differed so much from those of England, should regard the attempt with coolness.

The local government clauses of the 5 & 6 Vic. c. 76 project a somewhat thorough scheme. They empower the Governor to establish "districts" in any part of the colony, irrespective of existing local boundaries, and to create by letters-patent a "District Council" for the local government of each, under the following conditions—

1. The council to be elective after the first nomination,<sup>2</sup> with a membership varying from nine to twenty-one, according to the number of the population.
2. The franchise and qualification for membership to be the same as

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<sup>1</sup> Henceforward the term "local" will be applied to municipal (as distinguished from central) government within the colony.

<sup>2</sup> Any vacancies not filled by election within the proper time are to be filled by the Governor's appointment. § 46.

for the Legislative Council, till the colonial legislature shall make other provision.

3. No councillor is to hold paid office under the council, nor to contract with it.
4. The limit of tenure without re-election of a seat in the council is to be three years.
5. Each council is to have a warden, appointed by the Crown.
6. A district surveyor and other necessary officers are to be appointed by the Council subject to the approval of the Governor.
7. The details of the expenditure of each council are to be laid annually before the Governor.<sup>1</sup>

The district councils are empowered to legislate for several purposes, of which the following are the most important.

1. The making, building, or repairing of roads,<sup>2</sup> bridges, and public buildings.
2. The acquisition of property for public purposes.
3. The raising of funds for the performance of the duties of the council, especially for the maintenance of schools, and the administration of justice and police.

But a by-law or order of the council may not impose imprisonment, nor a pecuniary fine greater than ten pounds,<sup>3</sup> and every by-law must be transmitted to the central authority within fourteen days of its being passed, the Governor having power to veto it within two months after its receipt, and its operation being held in suspense during that time.<sup>4</sup>

The Act further provided<sup>5</sup> that one half of the police expenses of the colony (exclusive of the convict establishment) should be paid by local taxation in the districts, and the other half out of the general revenue, and authorises the Governor, after apportionment of the levy by the legislature upon the various districts, by Act upon the estimates, to levy from the respective district treasurers the amount payable by their districts,<sup>6</sup> with power to enforce payment by distress and sale of the goods of the treasurer, the members of the council, or, failing these, the inhabitants of the district.<sup>7</sup> But the control of the police was not given to the local authorities, the Governor being merely bound to expend the sum raised in any district, *plus* a similar sum from the

<sup>1</sup> § 41.

<sup>2</sup> The main roads were in the hands of the central government.

<sup>3</sup> § 42.

<sup>4</sup> § 44.

<sup>5</sup> § 47.

<sup>6</sup> § 48.

<sup>7</sup> § 49.

general revenue of the colony, for the police of that district, and the council being entitled to a credit for next year of any surplus.<sup>1</sup>

This was the Local Government scheme of 1842. It followed, in the main, the generally accepted principles of local government, allowing great autonomy to a representative local council, but keeping a veto for the central government on its policy. In one particular, however, it undoubtedly violated accepted principles, namely, in the matter of the police. The district had to raise police funds and hand them over for expenditure to another authority, the character of this arrangement being but partially mitigated by the contributions from the central government. This arrangement was perhaps necessary, but it was sure to be unpopular. It will be observed also that the incorporated district differed from the incorporated town, such as Sydney or Melbourne, in the franchise qualification, in the nominee character of its warden, and in the greatly smaller powers of the council.

As a matter of fact, the scheme was a complete failure. At first there seemed to be a faint disposition to welcome it. Petitions from Penrith,<sup>2</sup> Murrurundi,<sup>3</sup> and Illawarra,<sup>4</sup> asked that the provisions of the Act should be carried out. But these were soon outweighed by petitions of an opposite import from Bathurst,<sup>5</sup> Dungog,<sup>6</sup> Maitland,<sup>7</sup> Merton and Muswellbrook,<sup>8</sup> Hartléy,<sup>9</sup> Raymond Terrace,<sup>10</sup> and Jerry's Plains.<sup>11</sup> The main grounds of objection to the scheme were the narrowness of the franchise and the police contributions. On the first ground the squatters of Port Phillip prayed that their stock might not be subject to assessment by the district councils.<sup>12</sup>

Nevertheless the Governor determined to attempt the introduction of the scheme. On the 21st July 1843 the District Council of Maitland was established. Its charter, after reciting the sections of the Act of 1842, incorporates the inhabitants of the district (which does not appear to coincide with the county boundaries), with a warden and council of six. Future councillors are to be elected in the same

<sup>1</sup> § 50.

<sup>2</sup> *Votes and Proceedings*, 1843, p. 42.

<sup>3</sup> *Ibid.* p. 61.

<sup>4</sup> *Ibid.* p. 213.

<sup>5</sup> *Ibid.* p. 51.

<sup>6</sup> *Ibid.* p. 73.

<sup>7</sup> *Ibid.* p. 77 (Petition in full).

<sup>8</sup> *Ibid.* p. 91.

<sup>9</sup> *Ibid.* p. 127.

<sup>10</sup> *Ibid.* p. 127.

<sup>11</sup> *Ibid.* p. 149.

<sup>12</sup> *Ibid.* p. 201.

manner as members of the Legislative Council. The council is to meet quarterly, and at other times when specially summoned. Its officers are to give security, and their accounts are to be examined by the audit committee of the council, and then to be transmitted to the Governor.<sup>1</sup>

During the month of August charters followed one another in rapid succession, all reproducing the terms of the Maitland charter, except in point of numbers of the council.<sup>2</sup> On the 17th August the districts of Bourke and Grant in Port Phillip received their charters, but the districts thus created did not coincide with the previously existing counties similarly named.<sup>3</sup>

The wave of opposition, however, soon rose strongly. The Governor endeavoured to smooth the situation by introducing a bill to widen the municipal franchise,<sup>4</sup> and by agreeing with the Legislative Council to postpone the operation of the obnoxious 47th section for a year.<sup>5</sup> But the measure was not carried, and when in the following year the Governor brought forward bills for the police assessment and for the reform of the district councils, the former was summarily rejected, and to the latter an amendment was carried, by a majority of two to one, that "in the opinion of this Council the District Councils are totally unsuited to the circumstances of the Colony." On the 9th August 1844 the Council carried an Address requesting the Governor to attempt to procure the repeal of the Local Government clauses of the Act of 1842, and suggesting that the police expenses should be defrayed out of the general revenue.<sup>6</sup> On the 20th August the Governor replied that he would accept the sums voted, but declined to take any responsibility for this breach of the constitution.<sup>7</sup> Apparently the assessment was never imposed on the districts,<sup>8</sup> and the whole scheme was allowed to lapse. Occasionally a district council published its accounts. Those of the Parramatta Council for the year 1845 show that its only income was from government grants.<sup>9</sup> It was the same in 1846.<sup>10</sup> And

<sup>1</sup> *Gov. Gazette*, 26th July 1843.

<sup>2</sup> *Gazettes*, 1st, 15th, 29th August, and 5th September.

<sup>3</sup> Cf. boundaries in *Gov. Gazette*, 1843, p. 1147.

<sup>4</sup> On the 22d November 1843. *Votes and Proceedings*, 1843, p. 201.

<sup>5</sup> *Ibid.* p. 138.

<sup>6</sup> *Ibid.* 1844.

<sup>7</sup> *Ibid.*

<sup>8</sup> Cf. accounts for the year 1843, in *Votes and Proceedings*, 1846 (1).

<sup>9</sup> *Gov. Gazette*, 1846, p. 467.

<sup>10</sup> *Ibid.* 1847, p. 443.

in the year 1847 the committee of the Legislative Council appointed to inquire into the state of the roads and bridges in the colony, after suggesting that the constitution probably contemplated the control of such matters by the district councils, added "but, by a sort of tacit consent, as well on the part of the District Councils themselves as of the Executive government, they have never for an instant been in full operation, although the Letters-Patent establishing and defining their several boundaries and jurisdictions were issued shortly after the promulgation of the Imperial Law which authorised their existence."<sup>1</sup> And the committee practically recommended the withdrawal of roads and bridges from the district councils, by the constitution of elective local trusts for maintenance and repair, the expenses of the trunk routes being first provided by the general revenue.<sup>2</sup>

This policy was virtually adopted for the neighbourhood of Sydney by the 11 Vic. No. 50 (N. S. W.), and subsequently became the general policy of Victoria, and the starting-point of local government for the rural districts. The district councils still dragged on a nominal existence. Illawarra went through the form of an election in 1849.<sup>3</sup> But in 1848 the governor had had to fill up by nomination 14 councils, including those of the districts of Bourke and Grant. And it appears that the new Roads Trusts sometimes really swallowed up the older councils; for instance, in the case of Parramatta, whose council in the year 1849 handed over the whole of its small income to the local Roads Trust.<sup>4</sup> Some of the district councils were insolvent from the first.<sup>5</sup>

It is not difficult to see why the scheme was a failure. In the first place, it was too ambitious. It aimed to introduce a full-blown system at a single step, its authors apparently forgetting that the art of government requires gradual education, and that there had been no opportunities for such education in the rural districts of New South Wales. Secondly, the scheme was not local enough. It was merely a reproduction, on a small scale, of the Legislative Council at Sydney, and it excited no special local interest, it appealed to no particular local feeling.

<sup>1</sup> *Votes and Proceedings*, 1874 (2), p. 813.

<sup>2</sup> *Ibid.* p. 334.

<sup>3</sup> *Ibid.* 1849 (1), p. 295.

<sup>4</sup> *Gov. Gazette*, 1850, p. 843.

<sup>5</sup> *Votes and Proceedings* (Victoria), 1852 (2), p. 382.



The district councillors had very little power; in some of the most important functions of local government they would have been mere agents of the central authority.

Thirdly, on the other hand, the councillors undertook a serious liability. They were liable, after the treasurer, to distress for non-payment of the police assessment, even though their own quota had been duly paid. A sparsely peopled district could hardly be expected to spare, in addition to its legislative members, six other men of sufficient public spirit to undertake an unpaid task, attended with considerable liability, and bringing very little influence. There was no leisured class in the rural districts, to aspire to the duties of government, which, in a newly-settled locality, are usually very heavy.

But fourthly, there was perhaps a deeper reason than these for the failure of the plan. Before a community can successfully work a scheme of self-government, it must possess a social unity and a sense of common interest. This was the secret of the vitality of the Teutonic village-settlement, from which sprang the English system of local government. The Teutonic settlers were bands of kinsfolk, knit together also by a sense of a common danger, and a common desire to ward off that danger.<sup>1</sup> They were occupied chiefly with agriculture, a pursuit which demands steadiness of residence and permits of co-operation. The country districts of New South Wales were ranged over, rather than settled, by individuals having little sense of fellowship with their neighbours, fearing very little the dangers which did sometimes threaten them, and engaged mainly in pursuits which encouraged wandering habits and wide separation.

The history of the district councils is a striking example of the truth that an unsuitable institution cannot be forced upon a community, or, as it is frequently put, that institutions must grow, not be made. Gradually, as the country became more settled, the need of local government was felt, first in one particular, and then in another, and, in the end, the process came easily enough.

<sup>1</sup> The same qualities, religion being substituted for kindred, were the secrets of the success of the New England townships of the United States.

## CHAPTER XI

### THE LAND QUESTION

No subject was more copiously discussed, nor more fiercely agitated, during the second period of the constitution than the Land Question. At first sight it seems hopeless for one who has not passed through the agitation, nor taken part in the discussion, to grapple with the intricacies of the subject. The mere physical difficulties of space cause endless confusion. For instance, during the time which must elapse between the despatch of a memorial or report from the colony, and the receipt of the reply of the Home government, we find that the whole question has changed front, and that the aspect of it which caused so much excitement when the memorial was drawn up, has ceased to be of interest when the answer arrives, while a new aspect is then being vigorously canvassed, and is giving birth to its own mass of documents.

Still it is possible that an impartial and disinterested observer, though he views the agitation from a distance, may obtain as clear a judgment of the real facts of the case as the keen partisan who has lived through it, and knows all its details, so to speak, unconsciously. The latter may know all the details, but he may not have grouped them with strict proportionate accuracy. Sometimes the stranger in the distance, looking through his telescope, can judge the respective heights of the buildings in a town better than the citizen who daily walks its streets.

Our first attempt must be to sketch a plan. We shall never understand the Land Question if we attempt to master it all at once. There were three distinct (though sometimes converging) elements in the land agitation of the period. They

may be, defined as the Sale question, the Squatting question, and the Quit-Rent question. We must deal with these separately, though cross-references will sometimes be necessary.

#### A. SALE.

Almost contemporaneously with the new constitution, there came into force the first of a long series of Acts dealing with the sale of land in the Australian colonies. This was the Crown Land Sales Act of 1842, the 5 & 6 Vic. c. 36. It was passed with the object of securing an uniform system throughout Australasia, and included in its provisions, not only New South Wales, but also Van Diemen's Land, South Australia, Western Australia, and New Zealand.<sup>1</sup> It laid down the fundamental proposition that there should be no disposal of Crown land otherwise than by sale at public auction of surveyed blocks not exceeding one square mile,<sup>2</sup> except in the following cases—

1. Lands required for public purposes.<sup>3</sup>
2. Lands granted to military and naval settlers.<sup>3</sup>
3. Lands occupied under annual licence for depasturing or timber-cutting.<sup>4</sup>
4. "Country" lots put up for sale and not sold.<sup>5</sup> (The private sale, however, must not be for less than the highest bidding or the upset price at the auction.)
5. Unsurveyed blocks comprising 20,000 acres or more.<sup>6</sup> (But these are not to be sold at less than the lowest upset price of lands in the colony.)

The sales by auction are to take place quarterly, upon due notice, and the lands sold are to be ranked in three classes of "Town Lots," "Suburban Lots," and "Country Lots." The first of these will include all lands within the boundaries of existing or contemplated towns. The second all lands within a distance of five miles from any boundary of a town, unless the Governor should see fit to exempt in any particular instance. The third comprises all other Crown lands.<sup>7</sup> The lowest upset price at which any land may be offered is to be £1 an acre,<sup>8</sup> and this sum may be increased at any time by the Governor, subject to the approval of the Home government,<sup>9</sup> but no reduction can

<sup>1</sup> 5 & 6 Vic. c. 36, § 22.

<sup>2</sup> §§ 2, 6.

<sup>3</sup> § 3.

<sup>4</sup> § 17.

<sup>5</sup> § 12.

<sup>6</sup> § 15.

<sup>7</sup> § 7.

<sup>8</sup> § 8.

<sup>9</sup> § 9.

be made at any time except by the Home government.<sup>1</sup> The Governor may also at any auction raise the prices of "special" lots in the third class, or of any lands in the other classes, provided that they are for the first time offered for sale, and that the special lots do not exceed, in the "Country" class, one-tenth of the whole offered in the class, and these raised prices may be reduced at any time by the Governor to the statutory minimum.<sup>2</sup> At private sales the price is always to be paid in ready money, and at auction sales there must be a deposit of at least one-tenth, with a contract to pay the balance within a month.<sup>3</sup> Purchasers are entitled to pay money in the United Kingdom and obtain certificates of the fact from the commissioners for the sale of Crown lands and emigration, which certificates must be accepted as cash by the colonial government.<sup>4</sup> The revenue from the sale of Crown lands (after payment of expenses) is to be devoted to the public service of the colony furnishing it, one-half to be expended in assisting emigration from the United Kingdom to that colony, in manner directed by the Treasury, subject to the regulations of the Privy Council.<sup>5</sup> The Governor of any colony is empowered by proclamation (subject to disallowance) to divide it into any number of parts not exceeding four, each part to be deemed a distinct colony for the purposes of the Act, except that no corresponding division of immigrants is to be necessary.<sup>6</sup>

The moment that the provisions of the Act became known in the colony, there arose a strong protest against the policy of fixing the minimum price at £1 an acre. Even in the short session of the old Council which was held to inaugurate the new constitution, a petition was presented, which described the measure as unjust and injurious,<sup>7</sup> and when the new Council met, further petitions came in.<sup>8</sup> The new Council, at once, on the 15th August 1843,<sup>9</sup> appointed a committee to inquire into the provisions of the Act regulating the price of land, and on the 5th December 1843 the report of the committee<sup>10</sup> was presented. It strongly deprecated the raising of the minimum price to £1 an acre, as tending to deter purchasers, both for agricultural and pastoral purposes, because neither

<sup>1</sup> § 10.<sup>2</sup> § 11.<sup>3</sup> § 13.<sup>4</sup> § 16.<sup>5</sup> § 19.<sup>6</sup> § 14.<sup>7</sup> *Votes and Proceedings*, 1843 (1), p. 13.<sup>8</sup> *Ibid.* (2), pp. 77, 185.<sup>9</sup> *Ibid.* p. 21.<sup>10</sup> *Ibid.* p. 765.

pursuit would yield a profit on the purchase money. It would therefore strengthen the already existing tendency towards squatting, which the report regarded as injurious to the permanent interests of the community. Being unable to buy land, immigrants would be forced into a roving life beyond the limits of location, and industry and revenue would alike suffer. The report founded its conclusions on this head upon the fact, that whereas during a period of nine years under the five-shilling minimum (1831-1839) the Crown revenue from land sales had averaged nearly £60,000, on the increase to twelve shillings it immediately fell to £12,000, while the prospects from the few months at £1 threatened to reduce it to about one-third of that sum.

But the report goes on further to condemn the system by which the land revenue is employed to bring labour into the colony. This system was, of course, the pet theory of Mr. Wakefield, and was accepted in England at that time almost as gospel. But the committee point out that, to work land profitably, both labour and capital are required, and that a system which sends capital out to bring labour in is unsound. They add that the great land sales of the past years have been chiefly made to the colonists themselves, the latter having in many cases borrowed the purchase money from English capitalists. The net result has been that the capital which has been brought in by borrowing has been sent out again for labour, leaving the liability on the colony. But it is expressly noticed that this latter argument does not apply to Port Phillip.

The remedy proposed by the report is to induce immigrants to come at their own expense, and then to allow them a remission on the purchase of land equal to the amount of their passage money. In this way it was hoped that a superior class of immigrants, who would not be eligible for assisted passages, would be induced to come, possibly even in associated groups, which "would form, in fact, colonies within the colony."

But, in any case, the committee insist that the uniform price of £1 an acre is too high, even according to the Wakefield system. "That price would bring immigrants to the country at the rate of sixteen to the square mile,"<sup>1</sup> and it is pointed out

<sup>1</sup> This reckons the cost of each immigrant at £20. (It will be remembered that only *half* the land revenue was devoted to immigration.)

that, in pastoral pursuits at least, the land will not support a twentieth of that number. The report, therefore, recommends that there shall be a division of the waste lands into classes, according to their value, a proportionate minimum price being set on each. The actual recommendations are—

1. The sandy and rocky scrubs. Minimum price 6d. an acre.
2. The common pasture lands. Minimum price 2s. 6d. an acre.
3. The rich pasture lands. Minimum price 5s. an acre.
4. The alluvial banks of rivers having  
access to the markets, and the rich  
brush lands along the coast. } Minimum price £1 an acre.

It is worth while to bear in mind the purport of this report, for it first embodies in definite terms the economic views which have played such an important part in the history of Australia. The weaknesses of some of them are very obvious, but there is no doubt that the recommendation with regard to the immigrants was admirably conceived. If it could have been carried out, it would both have checked the influence of inferior immigrants and held the hands of the great capitalists. Unfortunately it is just the class of immigrants aimed at which is most difficult to get. To the rich capitalist a remission of passage-money is too small an inducement to be of much avail. To the penniless labourer it is a mere mockery. While the person to whom it would be a real boon, the small tradesman or mechanic, with a hundred pounds or so of spare capital, is just the man whom it is most difficult to move. He has not enough means to speculate, he has too much to be reckless. To spend the savings of years in passage-money seems to him to be a reckless throwing away of the hard earnings of his labour. Had the scheme been carried into effect, the patience of Australians anxious for the speedy development of their country would have been sorely tried.

The report was, however, adopted,<sup>1</sup> and resolutions founded upon its conclusions passed by the Council and embodied in the form of an Address to the Governor, with a request that they, together with copies of the report and evidence, should be forwarded to the Home government.<sup>2</sup> But, before any

<sup>1</sup> *Votes and Proceedings*, 1843, ii. 231. Three government officials concurred in the adoption.

<sup>2</sup> *Ibid.* 231, 241. It will be observed, however, that the resolutions did not repeat the view of the committee that the employment of the Land revenue for purposes of immigration was "a fatal wrong."

reply could be received, the Council, in the following year,<sup>1</sup> appointed a second committee to inquire into all grievances connected with the lands of the territory, and to report, distinguishing between those which could be redressed in the colony and those which could not. On the 20th August 1844 the report was laid before the Council.<sup>2</sup> So far as the sale price of land is concerned, the report confirms the views of its predecessor, emphasising its conclusions by recent evidence, and pointing out that in almost every other British colony, Canada, Ceylon, the Cape, land could be obtained by immigrants on far easier terms than in Australia, while the national deterrents from emigration to Australia were in some respects greater than anywhere else.<sup>3</sup> The report recommends the total and immediate repeal of the 5 & 6 Vic. c. 36, and also of so much of the Constitution Statute as reserves the land revenue from the control of the colonial legislature.<sup>4</sup> This last recommendation, to which it will be necessary hereafter to recur, and which was supported by a long *précis* of historical evidence, perhaps reveals, more clearly than anything else, the ultimate hopes of the Council. But these hopes were not realised for another decade.

The report was taken into consideration on the 13th September,<sup>5</sup> and, after some debate, was adopted,<sup>6</sup> by the vote of the elective members, the ministerialists of course voting against it. A long series of resolutions dealing with the recommendations of the report was passed, and, accompanied by petitions to Her Majesty and both Houses of Parliament,<sup>7</sup> embodied in an Address to the Governor.<sup>8</sup> Meanwhile, a disclaimer of the more extreme language of the report, signed by 210 "Members of Council, Magistrates, Barristers, Clergy, Landholders, Bankers, Merchants, Traders, and other Inhabitants of New South Wales,"<sup>9</sup> was presented to the Governor and duly acknowledged by him and the Home government.<sup>10</sup>

On the 5th August 1845 the answer of the Home government to the Address of 1843 was laid before the Council by

<sup>1</sup> On the 30th May, *Votes and Proceedings*, 1844, i. p. 19.

<sup>2</sup> *Ibid.* p. 135.

<sup>3</sup> *Ibid.* vol. ii. p. 125.

<sup>4</sup> *Ibid.* p. 139.

<sup>5</sup> *Ibid.* vol. i. p. 211.

<sup>6</sup> *Ibid.* p. 216.

<sup>7</sup> *Ibid.* vol. ii. p. 121.

<sup>8</sup> *Ibid.* p. 122.

<sup>9</sup> Volume of Australian Papers, 1844-1850 (Melbourne Public Library).

<sup>10</sup> *Ibid.* pp. 3, 4.

the Governor.<sup>1</sup> It appears that in forwarding the address and report to the Secretary of State for the Colonies, Sir George Gipps had stated at length his views on the subject. He pointed out that the action of the Government, in raising the minimum price to £1 an acre, did not commit the Government to the view, assumed by the report, that all the land in the colony was worth £1 an acre, but merely to the view that it would be better for the present not to sell land of less value; that whereas the report professed to deprecate the step as prohibitive of the occupation of land, the real feeling of its authors was that it prohibited the *sale* of land. Upon this latter point the Governor says plainly, "A high minimum price acts as an inhibition on the sale of land which is not worth improving; and lands which are destined to remain for ages in an unimproved state are, in my opinion, better in the hands of Government than in the hands of private individuals. I am not at all prepared to admit that a tract of unimproved country, say any tract of ten thousand or twenty thousand acres of unimproved land, yields, at the present moment, more profit to the community, in the hands of an individual, than the same tract of lands would in the hands of the Government; I rather believe the contrary to be the fact."

The Governor also points out that the existing system does not prohibit occupation of the Crown lands, because of the permitted squatting practice, nor really the sale of land in reasonable quantities, for there is still much private land in the market. And then he goes on to hint pretty plainly that what the Council wishes is a return to the old land boom which lasted from 1835 to 1841, when enormous quantities of land were forced on the colonial market, bought with borrowed money, and then driven up to fancy prices in the English market by judicious advertisement. The Governor attributes the existing commercial depression of the colony to the reaction from that period of speculation. But he frankly admits that the report speaks the sentiments of a vast majority of persons of all classes in the colony.<sup>2</sup>

The Secretary of State took the opinion of the Colonial Land and Emigration Commissioners, and they, in an elaborate

<sup>1</sup> *Votes and Proceedings*, 1845, p. 14.

<sup>2</sup> Despatch in full in *Votes and Proceedings*, 1845, p. 333.



report, confirmed the views of Sir George Gipps, further pointing out that the remission system recommended by the Council was practically unworkable without a return to the old and condemned practice of free grants, and that the conclusions of the Council upon the relationship of labour and capital were refuted by the fact that the demand for labour in the colony was as great as ever.<sup>1</sup>

Fortified by the opinions of Sir George Gipps and the Emigration Commissioners, Lord Stanley sent back a decided refusal of the requests contained in the address. The request for a transfer of the Land Fund contained in the report he barely alluded to, preferring to treat it as a "demonstration." But he pointed to the enormous material progress made by the colony since the introduction of the sale system, as conclusive proof that it had not failed, and he expressed his determination to adhere to it. One thing, however, the Government would do; to remove all just cause of complaint, they would enable the squatter to purchase sufficient land for a homestead, and thereby render the land beyond the boundaries available not merely for pastoral occupation but for permanent residence.<sup>2</sup>

Whatever may be the opinion as to the wisdom of the policy pursued by the Home government on this occasion, there can be no doubt that it was actuated by the best motives and the most careful consideration. The Government declined to allow the colonists of New South Wales to treat its vast area as their private purse, it claimed a share in the land for all the subjects of the empire, and especially for the overcrowded populations of English cities. But it also asserted, and with obvious justice, that in supplying the colonists with labour at a low rate, it was giving them the one thing needful to their real prosperity. It is clear that the old days of indifference to colonial affairs were now over.

On the 20th May 1846 the Governor laid before the Council two despatches from Lord Stanley on the subject of Crown lands.<sup>3</sup> The first dealt mainly with the question of squatting, and therefore falls to be considered under another head. It is, however, worthy of notice that the despatch

<sup>1</sup> Report in *Votes and Proceedings*, 1845, p. 338.

<sup>2</sup> Despatch printed in *Votes and Proceedings*, 1845, p. 342.

<sup>3</sup> *Votes and Proceedings*, 1846, vol. i. p. 13.

approves of a measure recently introduced into the House of Commons with the object (amongst other things) of declaring the Crown's right to grant land, reserving the minerals or a royalty thereon.<sup>1</sup> This was the beginning of a subject which was afterwards to prove very important. The second despatch was in reply to the resolutions of 17th September 1844,<sup>2</sup> and is also concerned almost entirely with the squatting question.<sup>3</sup> On the 2d June<sup>4</sup> the Council addressed the Governor for a return of all correspondence between the executive and the Surveyor-General, since the date of the last returns, relative to the alteration in the upset price of land.<sup>5</sup> On the 10th September this correspondence was laid before the Council and proved to be very short, showing merely that the Governor had adopted the advice of a subordinate with regard to the size and minimum price of suburban allotments.<sup>6</sup> On the 25th, on the motion of Mr. Robert Lowe, the Council adopted a series of resolutions condemning the raising of the minimum price, and affirming the principle that the minimum upset price of land ought to be reduced to a sum not exceeding its value.<sup>7</sup> It is noticeable, however, that Mr. Lowe had only a bare majority on this occasion.

Still the matter was not allowed to drop. On the 23d July 1847 a committee of the Council was appointed to inquire into, and report upon, what ought to be the minimum "upset price or prices of land in the various counties and districts of New South Wales."<sup>8</sup> On the 13th August the Council addressed the Governor for a return of "all Acts and Regulations of the Government—Home as well as Colonial—affecting Crown lands, either as regards their sale or occupation, since the abolition of free grants in 1831."<sup>9</sup> In answer to this address the Council received (on the 9th September) a most valuable return, in which many documents affecting the question, which can scarcely be seen elsewhere, are set out at length.<sup>10</sup> On the 24th September the answer of the Secretary

<sup>1</sup> *Votes and Proceedings*, 1846, vol. i. p. 59 (copy of bill enclosed).

<sup>2</sup> *Ante*, p. 98.

<sup>3</sup> *Votes and Proceedings*, 1846, vol. i. p. 65.

<sup>4</sup> *Ibid.* p. 34.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* vol. ii. p. 249.

<sup>7</sup> *Ibid.* p. 46.

<sup>8</sup> *Votes and Proceedings*, 1847, vol. i. p. 129.

<sup>9</sup> *Ibid.* p. 161.

<sup>10</sup> *Ibid.* p. 633.

of State to the resolutions of 1846<sup>1</sup> was laid before the Council.<sup>2</sup> The answer merely adhered to the former position.<sup>3</sup> On the 28th the report of the new committee was presented.<sup>4</sup> It is extremely lengthy, and in its general features can best be described as one prolonged grumble. It fails to meet the main argument of Sir George Gipps and the Home government, and is valuable only for one suggestion, and for the evidence which it affords of the appearance of a feeling on two distinct points, one of which proved afterwards of some consequence. The committee point out that the high selling price of land, combined with the greater security recently given to the squatters, will tend to make the squatting interests so permanent and powerful as to be a source of danger to the community. No one being anxious to buy the squatting lands at £1 an acre, the squatters will remain undisturbed until they acquire a moral, if not a legal title to their lands, by prescription. The jealousy of the great squatters, now beginning to manifest itself, is clearly indicated by the report, which also betrays some ill-feeling against South Australia as the model colony, to gratify whose doctrinaire founders the price of land in New South Wales must be maintained at a prohibitive price.<sup>5</sup>

After this report, upon which no decided action seems to have been taken, there was apparently a lull in the storm, broken only by the presentation of occasional petitions.<sup>6</sup> The report was duly sent home, and on the 22d May 1849 the answer of the Secretary of State arrived.<sup>7</sup> Earl Grey stands by his former position, maintaining that the experience of Canada and Western Australia, where unrestricted land alienation has been allowed, proves clearly the superiority of the restrictive system, pointing out that the reduction in the amount of the Crown land sales in later years has only been natural and perhaps desirable, as private individuals take the place of the Government in the land market, and hinting that

<sup>1</sup> *Anle*, p. 101.

<sup>2</sup> *Votes and Proceedings*, 1847, vol. i. p. 215.

<sup>3</sup> Copy in *ibid.* p. 507.

<sup>4</sup> *Ibid.* p. 219.

<sup>5</sup> Report on *Votes and Proceedings*, 1847, vol. ii. p. 513. (It was suggested that a reduction of the minimum upset price in N. S. Wales would have drawn away immigration from South Australia.)

<sup>6</sup> *E.g.* 29th Sept. 1847, Liverpool, *Votes and Proceedings*, 1847, vol. i. p. 731.

25th April 1848, Queanbeyan, " " 1848, p. 395.

24th Nov. 1848, Yass, Volume of Australian Papers, 1844-1850.

<sup>7</sup> *Votes and Proceedings*, 1849, vol. i. p. 16.

the assertion of the report, to the effect that the raising of the price has almost annihilated land speculation, is a matter for congratulation rather than regret.<sup>1</sup> Accompanying Earl Grey's despatch is a long letter from the Emigration Commissioners, who repudiate very warmly the suggestion that the policy of the 5 & 6 Vic. c. 36 was influenced by the South Australian Commissioners (whose commission was cancelled before the Act was passed), and who answer in detail, in much the old strain, the various allegations of the committee. The objection that the combined policy of the Sale and Squatting Acts encourages dispersion and tends to confirm a squatting into an owning title, they meet by pointing out that these evils existed before the new policy came into force, will be checked by the powers reserved to the Crown, and are even now made a source of revenue.<sup>2</sup>

Meanwhile a new and interesting phase of the Land Question had appeared. On the 29th March 1848 there had been issued a new set of Land Regulations,<sup>3</sup> made in pursuance of an order of the Privy Council of the 9th March 1847,<sup>4</sup> which, though primarily dealing with the squatting question, were also concerned with the purchasers and grantees of Crown lands. They provided that the holders of *purchased* lands within the settled districts should be entitled to pasture their stock, free of charge, on any vacant Crown lands immediately contiguous to their respective properties, but without the power of erecting any building or enclosure, or of clearing or cultivating any portion.<sup>5</sup> But the permission was to carry no exclusive right, merely a right of commonage with other persons, and was to give way at once before any more permanent purpose for which the lands might be required.<sup>6</sup>

Moreover, the holders in fee-simple of *any* land within the settled districts are to be allowed to obtain leases of adjacent vacant Crown lands, to the extent of their own holding, but not less than 640 acres, at a fixed price of ten shillings per section of 640 acres.<sup>7</sup> If there are two or more claimants they must agree among themselves or (where there are only

<sup>1</sup> Copy of despatch in *Votes and Proceedings*, 1849, vol. i. p. 481.

<sup>2</sup> *Ibid.* p. 483.

<sup>3</sup> *Gov. Gazette*, 1848, 29th March.

<sup>4</sup> Copy in *Gov. Gazette*, 1847, p. 1071. The order itself was founded on the Act 9 & 10 Vic. c. 104, of which more anon.

<sup>5</sup> Regulations, § 2.

<sup>6</sup> *Ibid.* § 3.

<sup>7</sup> *Ibid.* § 16.

two rivals) submit to an arbitration, or the leases will be put up to auction in the same way as those to which there is no pre-emptive claim.<sup>1</sup> These Regulations do not specify the length or terms of such pre-emptive leases, but, by inference,<sup>2</sup> we may assume that they were annual, for pastoral purposes only, and carried no right to claim compensation for improvements. Holders of granted lands on which the quit-rents have been redeemed are to be deemed purchasers for purposes of the Regulations; where the quit-rents are not redeemed, they stand on the footing of grantees—*i.e.* are not entitled to free commonage, but have a pre-emptive right to leases to the extent of their granted lands.<sup>3</sup>

It will be observed that these Regulations, whilst providing a commonage pasture for the small landholders, do not make any provision for a several or separate pasturage for any one whose holding is less than 640 acres. The claims of these persons, however, received attention later in the year, when the Government and the Surveyor-General between them devised a plan by which each smaller portion sold<sup>4</sup> was surrounded by a belt of reserve, bounded by section lines or streams, described as "a sort of commonage," but really arranged as small severalties.<sup>5</sup>

Once more the whole question was considered by a committee of the Council, appointed on the 12th June 1849.<sup>6</sup> Mr. Robert Lowe was again chairman. On the 3d October<sup>7</sup> another lengthy report was brought up, which, after combating at great length and with much acrimony the various arguments of the Home government, finally agreed with all those arguments in principle, but differed from them in the matter of application. The contention of the committee now is that the suggested price of five shillings an acre will do all that the existing price of £1 is supposed and desired to do, while it will allow a moderate sale of land, and put a stop to

<sup>1</sup> § 19.

<sup>2</sup> § 4.

<sup>3</sup> § 21.

<sup>4</sup> The question was rendered important by the practice then recently introduced of selling "Special Country Lots" of twenty to thirty acres to small farmers.

<sup>5</sup> *Vide* letter to Surveyor-General, *Votes and Proceedings*, 1849, vol. i. p. 816. See reference to this plan in Regulations of 21st November 1848, *Gov. Gazette*, 24th November 1848.

<sup>6</sup> *Votes and Proceedings*, 1849, vol. i. p. 57.

<sup>7</sup> *Ibid.* p. 289.

the encroachments of squatters. "Thus the colonists are at issue with the Home government, not on a question of political or economical science, but on the exchangeable value of a commodity regulated by local circumstances, of which the most ordinary intelligence on the spot must necessarily be a better judge than the most enlightened statesman in Europe.<sup>1</sup>

The contention of the committee being thus stated in a nutshell, we can test its validity in a very simple way. The committee argue that the price of £1 an acre is not merely restrictive, but prohibitory, and that five shillings is the fair value.<sup>2</sup> Turning to the figures quoted in the report itself, we find the following facts—

1. That the raising of the minimum price from five shillings to twelve shillings in 1839 apparently reduced the sales from 465,000 acres (1838) to 254,000 (1839), but that the sales in 1840 rose again to 527,000 acres.
2. That the introduction of a *fixed* price of £1 an acre at Port Phillip in 1841 was followed by a fall to 117,000 acres in the same year. But it is necessary to observe that, while the sales in Port Phillip, where alone the change worked, fell from 83,000 acres (1840) to 49,000 (1841), or a decrease of about 41 per cent, in the Sydney district, *where there was no change at all*, they fell from 444,000 acres (1840) to 68,000 (1841), or a decrease of about 600 per cent. Evidently the change was due to something else than the alteration of price.<sup>3</sup>
3. That in spite of the restoration of the twelve shillings minimum in Port Phillip in 1842, the total land sales of the colony fell again from 117,000 acres (1841) to 44,456 acres in 1842.
4. That on the general raising of the minimum price to £1 an acre, in 1843, the sales fell again to 11,000 acres in that year, and to 7000 in 1844. But this was the lowest point. In spite of the maintenance of the high price, the sales rose in 1845 to 18,000 acres, to 27,000 in 1846, and to 62,000 in 1847, when the protests of the Council were loudest. They had, however, fallen again to 47,000 acres in 1848.<sup>4</sup>

It seems quite safe to draw two inferences from these facts: first, that other causes than the amount of the minimum price had a great effect on the quantity of land sold; second, that the fixing of the minimum price at £1 an acre did not prohibit the sale of Crown land.

<sup>1</sup> *Votes and Proceedings*, 1849, vol. ii. p. 553.

<sup>2</sup> *Ibid.* p. 552.

<sup>3</sup> The necessary information as to the Port Phillip figures is taken from the tables in the *Victorian Year Book*, 1887-88.

<sup>4</sup> See summary in *Votes and Proceedings*, 1849, vol. ii. p. 549.

Nevertheless the report was duly sent home, only once more to receive an emphatic refusal from the Secretary of State, founded upon another confirming opinion of the Emigration Commissioners.<sup>1</sup>

### B. SQUATTING.

We turn now to consider the second division of the land question—the subject of squatting.

On the 13th September 1843 Port Phillip District was subdivided into four squatting districts for the purposes of the Squatting Act,<sup>2</sup> these four replacing the old pair proclaimed on the 1st July 1840.<sup>3</sup> The four districts were named respectively the Gipps Land, Murray, Western Port, and Portland Bay districts. The two new districts, Murray and Gipps Land, were mainly carved out of the old Western Port district of 1840, so that it would appear that squatting was then being pushed in northern and easterly directions. But on the 9th November 1846 the fifth district of Wimmera was added in the north-west.<sup>4</sup> Perhaps a safer estimate of the increase of squatting pursuits may be obtained from a Return presented to the Council in pursuance of an Address dated the 3d October 1843.<sup>5</sup> The Return shows that the receipts from fees paid to the Commissioners of Crown lands in the Port Phillip District rose from £10 : 3 : 6 in 1839 to £40 : 16 : 6 in 1840, to £139 : 12s. in 1841, and to £190 in 1842.<sup>6</sup>

But proportionally large as the increase had been, it was clear that the actual amounts received were ridiculously small. No returns as to the extent and stock of the squatting stations in Port Phillip at this date are to hand, but in New South Wales proper nearly 700 stations in the year 1840 paid just £60 for license fees, while the 800 of 1841 only yielded a third of that sum.<sup>7</sup> As the total acreage in the stations of 1841 included 9000 acres under actual cultivation, it was

<sup>1</sup> Volume of Australian papers, 1844-1850.

<sup>2</sup> Vic. No. 7 (N. S. W.)

<sup>3</sup> *Gov. Gazette* of that date (N. S. W.)

<sup>4</sup> *Gov. Gazette*, 1846, p. 1401.

<sup>5</sup> *Votes and Proceedings*, 1843, p. 111.

<sup>6</sup> *Ibid.* 1843, p. 493.

<sup>7</sup> *Ibid.* p. 494. Later statistics show that in the Murray district in 1844 one squatter held 610,000 acres under one £10 license, another 96,000, two others 77,000 each. In the Gipps Land district the runs were smaller, the largest being 54,000 acres. But the *smallest* holding under one license was 1300 acres. (Cf. *Votes and Proceedings*, 1844, vol. i. pp. 672, 673.)

clear that the squatters were getting agricultural land at about fivepence an acre rent, without reference to the vast pastoral tracts occupied by them, which were, however, covered by the stock tax. It should be observed that the proceeds both of the licence fees and the stock tax went into the general revenue.

It seems to have been the practice, under the existing squatting Regulations, to grant a £10 licence which enabled a licensee to occupy any number of runs without other permission.<sup>1</sup> To remedy this abuse, new Regulations were issued on the 2d April 1844 which required that a separate licence should be taken out for each station, that no station should exceed in area twenty-five square miles, unless the Crown Land Commissioner should certify that the stock carried upon it required more, and that blocks of land seven miles apart should be considered separate stations.<sup>2</sup>

But the matter evidently required further treatment. On the one hand it was necessary to protect the public, whose land would be diminished by any permanent interest given to the squatters; on the other, it was most desirable that the squatters should be encouraged to improve and civilise somewhat smaller tracts of country instead of roaming over vast areas.

Accordingly, on the 13th May 1844,<sup>3</sup> the Governor announced that he had sent home, in the "General Hewitt," certain recommendations to Her Majesty's Government on the subject. His principal suggestions were as follow—

1. To allow a squatter, after five years' occupation, to purchase the fee-simple of not more than 320 acres of his run at a minimum price of £1 an acre, subject, however, to a deduction for improvements effected.<sup>4</sup>
2. To guarantee such a purchaser undisturbed possession of his run for a further term of eight years, upon renewal of the annual £10 licence.
3. To allow at the end of such eight years a further purchase of 320

<sup>1</sup> Cf. correspondence in *Votes and Proceedings*, 1844, vol. i. pp. 645-674.

<sup>2</sup> *Gov. Gazette*, 1844, 2d April.

<sup>3</sup> *Sydney Morning Herald*, 13th May 1844, and *Votes and Proceedings*, 1844, vol. ii. p. 142. The ship sailed on the 3d April.

<sup>4</sup> The land was to be put up to auction at £1 reserve, *plus* the value of the improvements, which was to be credited to the squatter.



acres on similar terms, with a further guarantee for eight years, and so on.

4. If, however, the squatter is outbid at auction, the purchaser of the homestead, whoever he may be, is to have the rest of the run.

The policy of the recommendations is not very clear. If it were to discourage monopolists and encourage settlers with moderate capital, it is obvious that the provision for sale by auction would singularly defeat the Governor's object. This provision would also deprive squatters of the security which the recommendations apparently intended to give them, by making it uncertain for any man whether he would not be turned out of his run at the end of eight years, with his remote 320 acres of purchased land, valuable only as an adjunct to his run, left worthless on his hands.

It is not a surprise, therefore, to find that both these recommendations, and the preceding Regulations of the 2d April 1844,<sup>1</sup> were exceedingly unpopular. Nineteen petitions, comprising 6500 signatures, are said to have been presented against them.<sup>2</sup> Meetings to denounce them were held throughout the colony,<sup>3</sup> including one at Melbourne, where it was determined to form a society of stockholders for the protection of pastoral interests, to be called the "Pastoral Society of Australia Felix."<sup>4</sup> Written opinions, many of them extremely long, were sent to the Land Committee of the Council then sitting, from all parts of the colony, by well-known settlers. Most of these opinions are decidedly unfavourable to the new policy but not all. A notably brief and emphatic communication from Mr. S. G. Henty of Portland<sup>5</sup> approves of all the new Regulations except that which provides that stations seven miles apart shall be deemed separate.

The report of the committee of 1844<sup>6</sup> also emphatically condemned the new regulations as "not only oppressive in their details, but absolutely impracticable in their original conception."<sup>7</sup> But the main objection of the committee seems to have been of a legal rather than an economic character. They strive earnestly to show that the Regulations are *ultra vires*.

<sup>1</sup> *Ante*, p. 107.

<sup>2</sup> *Votes and Proceedings*, 1844, vol. ii. p. 141. See the petitions in full, *ibid.* pp. 1-40.

<sup>3</sup> *Ibid.* p. 361 *et seq.*

<sup>4</sup> *Ibid.* p. 367.

<sup>5</sup> *Ibid.* p. 346.

<sup>6</sup> *Ibid.* 1844, vol. ii. p. 126.

<sup>7</sup> *Ibid.* p. 129.

"Either," they say in effect, "the Squatting Act<sup>1</sup> was invalid as a fraud upon the Imperial Statute, 1 Vic. c. 2, by which the territorial revenue of the Crown was given up to the Consolidated Fund in return for a Civil List, or the Regulations are unconstitutional as attempting to raise taxation without parliamentary grant. The stock tax is provided for by the Squatting Act, but the alteration in the system of licences is a new taxation."

The answer to this contention, which is supported by a good deal of rather unsound constitutional learning, is simply this: that the licence fees were not imposed under the Squatting Act, which merely alludes to and recognises the right of the Crown to grant licences, and expressly saves the rights of the Crown in all respects.<sup>2</sup> The licence fees were not taxation, but rent. Though they were paid into the colonial exchequer, they really belonged to the Land Fund, which was then part of the Consolidated Fund of the empire, though by the English parliament allotted to particular purposes. The only authority entitled to complain of the Governor's action in the matter was the English parliament.<sup>3</sup>

In the year 1846 came the despatch of Lord Stanley,<sup>4</sup> enclosing the draft of a bill proposed by Mr. Hope, and stating the views of the Home government upon the subject. The objects of this policy are stated by Lord Stanley to be the rendering available of the waste lands of the colony for pastoral purposes, with a due regard to the ulterior interests of the community. These objects it is proposed to effect by authorising the Governor to grant either annual occupation licences or leases for not more than seven years, which leases are to be granted without competition to persons who have been in occupation of their runs for five years, but in other cases after bidding at auction. Occupation under licence is not to give any right as against the Crown, but lessees will of course be unremovable during the existence of their terms.<sup>5</sup> The bill

<sup>1</sup> 2 Vic. No. 27 (N. S. W.)

<sup>2</sup> §§ 2 and 26.

<sup>3</sup> Temporary arrangements were made by Regulations of the 10th July 1845 (*Gov. Gazette*, 11th July 1845).

<sup>4</sup> Copy in *V. and P.*, 1846, vol. i. pp. 59-65.

<sup>5</sup> §§ 1 and 7 of bill in *Votes and Proceedings*, 1846, vol. i. pp. 62 and 63. The first section also provides that the reversion may not be sold by the Crown without the consent of the existing lessee.

contemplates the granting of licences without fee, but licensees on such terms are to pay an annual agistment charge not exceeding one penny for each sheep, or threepence for each horse or head of cattle, to be fixed by Order in Council, or by the Governor and his Executive Council.<sup>1</sup> Moreover, the Governor is to have power to reserve all the minerals in any grant or lease, or a royalty for the working thereof.<sup>2</sup> It is expressly provided that all proceeds from licence fees, agistments, rents, and royalties shall form part of the Land Fund, in the same manner as sale proceeds under the 5 & 6 Vic. c. 36.<sup>3</sup>

Meanwhile the Regulations of 1844 had created a feeling of discontent which was about to break out into open flame. The existing Squatting Act (2 Vic. No. 27) had been only temporary, and had been renewed with amendments in 1841 by the 5 Vic. No. 1. This renewal was about to expire on the 30th June 1846. A strong party in the Council had made up its mind to prevent its re-enactment, and the Governor, warned of the approaching storm, had been obliged to instruct the Crown Land Commissioners<sup>4</sup> to inform the men of the Border Police that it was quite uncertain whether the Government would have the funds to continue their services after the 30th June. The anticipated result happened. When the Colonial Secretary moved<sup>5</sup> the first reading of the renewing bill, his motion was defeated, after a narrow division, by an amendment which substituted for it an Address to the Governor.<sup>6</sup> The Address declined, on the legal grounds stated in the report,<sup>7</sup> to renew the Squatting Acts, but offered on the part of the Council to co-operate in organising a police for the squatting districts, on the understanding that the police was not used for collecting Crown revenue. The Address, when presented, came very near producing a passage of arms between the Governor and the Council, but the danger was happily averted.<sup>8</sup>

Still the great difficulty remained. Was the Border Police to be disbanded?

Before the close of the first session of 1846 the Governor made a suggestion. Owing to the increased productiveness of

<sup>1</sup> § 6.<sup>2</sup> § 2.<sup>3</sup> § 8.<sup>4</sup> See circular letter of 3d April 1844 in *Votes and Proceedings*, 1846, vol. i. p. 247.<sup>5</sup> On the 3d June 1846, *ibid.* p. 37.<sup>6</sup> *Votes and Proceedings*, 1846, vol. i. p. 39.<sup>7</sup> *Ante*, p. 109.<sup>8</sup> *Votes and Proceedings*, 1846, vol. i. p. 43.

the stock tax during the preceding two or three years there was a considerable surplus, about £17,000, from the funds devoted to the maintenance of the Border Police. This sum the Governor proposed, with the concurrence of the Council, to expend in continuing the force, at least for a short time. But there was another difficulty. Of this £17,000 about £14,000 came from the squatting districts of Port Phillip alone, and the Governor did not think it right in these circumstances to use the whole as a general fund for the colony. He proposed, therefore, to expend the £14,000 on the four squatting districts of Port Phillip.<sup>1</sup>

Time and reflection, however, brought wisdom. On the 12th June the Council adjourned for six weeks, in no very placid state of mind.<sup>2</sup> The Governor had not ventured to include the Border Police in his regular estimates for the year 1847.<sup>3</sup> When the Council met for the second session, on the 8th September,<sup>4</sup> Governor Gipps had been succeeded by Sir Charles Fitz Roy, and all was politeness and amiability. The new Governor promptly presented additional estimates, which included the large sum of £22,300 for the expenses of the Border Police, but proposed to charge the strict expenses of the Commissioners (amounting to £5000 odd) upon the Crown revenues.<sup>5</sup> How much can be won by a little suavity! The estimate went through without a shade of alteration.<sup>6</sup>

But the long-expected statute did not arrive, and the new Governor had to make such temporary provision as he could for the squatting question. By Regulations of 30th June 1846<sup>7</sup> the temporary rules of Sir George Gipps were adopted for another year, before the expiring of which it was anticipated that Mr. Hope's measure would have become law. On the 26th June 1847<sup>8</sup> the Legislative Council received the long-looked-for statute, together with the draft of a proposed Order in Council to be made under it. The Act in question is the 9 & 10 Vic. c. 104, which is very much simpler than Mr.

<sup>1</sup> *Votes and Proceedings*, 1846, vol. i. p. 165.

<sup>2</sup> *Ibid.* p. 57. There were omens of discontent other than the Squatting question. Mr. Lowe had carried a resolution to address Her Majesty in favour of a reform in the colonial department, *ibid.* p. 55.

<sup>3</sup> Of 28th May 1846, *ibid.* p. 135.

<sup>4</sup> *Ibid.* vol. ii. p. 1.

<sup>5</sup> *Ibid.* pp. 199, 203, 204.

<sup>6</sup> *Ibid.* p. 99, Resolution 29.

<sup>7</sup> Copy in *G. G.*, 3d July 1846.

<sup>8</sup> *Votes and Proceedings*, 1847, vol. i. p. 40.

Hope's bill of the previous year.<sup>1</sup> It leaves the question of minerals untouched, and merely authorises the Crown to grant leases of or licences to occupy any of its waste land in Australia for any period not exceeding fourteen years, and to reserve any rent or other return therefrom, the pecuniary proceeds of such reservation to go to the Land Fund provided by the 5 & 6 Vic. c. 36.<sup>2</sup> All minor points are to be provided for by Order in Council, except that no such Order may authorise the sale of lands otherwise than under the Act of 1842, except in the single case of sale to occupants under pre-emptive right, and even then the sale is not to be for less than the regular minimum price.<sup>3</sup>

The draft of the proposed Order accompanying the Act is very important, but as its provisions were almost exactly repeated in the actual Order of next year, it will be more convenient to notice the differences in our analysis of the latter document. Of course the draft of 1846 only acted as an indicator.

On the 13th August 1847<sup>4</sup> Mr. Lowe carried an address to the Governor for a return of licensed stations beyond the settled districts, and on the 4th April 1848 the return was laid before the Council.<sup>5</sup> An additional statement was supplied on the 9th May,<sup>6</sup> and from these documents we gather that there were in the Port Phillip squatting districts,<sup>7</sup> in the year ending 30th June 1848, 901 licensed stations, with a total area of 30,000 square miles, and a total stock of upwards of 3,000,000 head. These stations were in the hands of 822 persons, so that the aggregation of runs was not serious. On the other hand, the tendency to form very large runs was obvious. Of the total number of 901 more than two-thirds contained upwards of 10,000 acres each, more than one-third upwards of 20,000, and more than one-fourth upwards of 30,000. Gippsland was altogether the thinnest district, both in the number and acreage of her stations. The

<sup>1</sup> *Ante*, p. 109.

<sup>2</sup> §§ 1 and 2. The Act (§ 11) exempted New Zealand from the operation of the 5 & 6 Vic. c. 36. Van Diemen's Land had been exempted by 8 & 9 Vic. c. 95. <sup>3</sup> § 6.

<sup>4</sup> *Votes and Proceedings*, 1847, vol. i. p. 161.

<sup>5</sup> *Ibid.* 1848, p. 375.

<sup>6</sup> *Ibid.* p. 377.

<sup>7</sup> It should be remembered that there were now five districts, Wimmera having been added in 1846.

new district of Wimmera was forging rapidly ahead, having a greater acreage occupied than Murray, or even the old district of Western Port. After this came the expected Order in Council. It is dated 9th March 1847,<sup>1</sup> and begins by providing that, for the purposes of the Order, all the lands in New South Wales shall be deemed to be divided into three districts, of "Settled," "Intermediate," and "Unsettled."

The "Settled" districts are to include—

1. The nineteen counties of New South Wales proper, and the reputed counties of Macquarie and Stanley.
2. The lands within a radius of 25 miles of Melbourne, 15 of Geelong, and 10 of each of eight other towns, of which the only one in the district of Port Phillip is Portland.
3. All lands within 3 miles of the sea.
4. All lands within 2 miles of either bank of the Glenelg, Clarence, or Richmond rivers, below points to be fixed, within certain limits, by the Governor.

The "Intermediate" districts are to include—

1. All other lands in the counties of Bourke, Grant, and Normanby in Port Phillip, and Auckland in Sydney district.
2. All other lands in the (squattling) district of Gipps Land.
3. The counties formed or intended to be formed between Auckland and St. Vincent, and all other counties proclaimed before 31st December 1848.

The "Unsettled" districts are to include—

All the other lands of the colony.

The order is, of course, mainly concerned with the third class of lands, in the "Unsettled" districts, which now must be taken to replace the old "lands beyond the boundaries of location." We will deal, therefore, with these provisions first, and put them in the form of rules.

1. The Governor may let runs for fourteen years for pastoral purposes only (except that the tenant may grow crops for his own use) at a rent to be calculated on the estimated sheep-carrying capacity of his run, at £2 : 10s. per annum for each thousand sheep, with a minimum capacity of four thousand.
2. The right of the Governor to enter upon the run for public purposes is reserved.
3. The carrying capacity of the run is to be estimated by the Crown Commissioner, and a valuer appointed by the applicant, with power to name an umpire.

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<sup>1</sup> *G. G.* 1874, p. 1071.

4. The rent is to be entirely independent of any stock-tax imposed by the colonial legislature.
5. During the lease term the fee-simple of the run is to be unsaleable except to the occupant, to whom the Governor may sell not less than 160 acres (selected in mode prescribed) at not less than £1 an acre. But the Governor may reserve from such sale any lands which he deems to be required for public purposes, and may fix a higher price on any that he deems specially valuable.
6. Notwithstanding the existence of a lease, the Governor may grant or sell any of the lands of the run for any purpose of public utility, or for mining; and if a railway is laid through or near a run, the lands on both sides within a distance of 2 miles may be sold at the end of any year of the term, upon sixty days' notice to the lessee, with right of pre-emption and compensation for improvements.
7. All licensees at present in occupation are to be entitled to leases of their runs if they apply for them within six months of the publication of the order, or within six months of the expiration of their year of licence, whichever is last.
8. New runs are to be applied for by sealed tender, the highest offer (generally) being entitled to succeed.
9. Leases are to be forfeited by—
  - a. Non-payment of rent.
  - β. Conviction of the lessee for felony.
  - γ. Conviction of the lessee by a justice of the district for any offence which two or more justices, within three months, may deem, subject to the approval of the Governor, to be a good ground for forfeiture, with or without compensation.
10. Runs of which the leases have expired may be put up to sale, subject to the following conditions—
  - a. The previous lessee may buy the land at its *unimproved* value (never to be less than £1 an acre).
  - β. If he declines, the value of his improvements (not exceeding the actual outlay) is to be added to the upset price, and paid over to him after the sale, by the Government.
11. If not more than a quarter of the run be sold, the previous lessee is to be entitled to a renewal of his lease at a rent representing the *improved* capacity (which is not, however, to exceed by more than 50 per cent his former rent), unless the run has previously been brought within the "Intermediate" districts.
12. Any other lessee is to pay the full improved rent, estimated as above provided.

In the "Intermediate" districts, the same rules are to obtain, except that—

1. No lease is to be for more than eight years.
2. At the end of *any* year of the lease, sixty days' previous notice

having been given, any part of the run may be put up for sale upon the terms of rules 10 and 11 (above).

In the "Settled" districts—

1. The governor may grant leases, exclusively for pastoral purposes, for terms not exceeding one year.
2. He may also make Regulations by which the holders of purchased lands may depasture their stock, free of charge, on the adjacent Crown lands, but without any other than a permissive right.<sup>1</sup>

The policy of the last rule was carried into effect by Regulations published on the 29th March 1848,<sup>2</sup> which authorised the holders of purchased lands within the "Settled districts" to depasture stock on contiguous Crown lands, in common with other adjacent holders, but subject to removal at any moment. The Regulations also announced that lands within the "Settled Districts" would be let in sections of not less than 640 acres at rents of not less than 10s. a section, certain special lands being excluded from the operation of this provision.<sup>3</sup> The leases are not to be assignable, and there is to be no compensation for improvements. Moreover the lessee can be ejected at any time upon a month's notice, and if, at the end of the year, he does not obtain a renewal, his lease is to be put up to auction. Holders of fee-simple purchased lands in blocks of 640 acres are to have pre-emptive rights of leasing three times the amount of adjacent Crown land (if such exists), the claims of rival owners to be submitted to auction. The lands within the "Settled Districts" at present held on squatting licences are, if possible, to be leased to the existing occupants at £1 a section, and such sections as contain valuable improvements are not at present to be let to any persons except the occupants.<sup>4</sup>

On the 16th May 1848<sup>5</sup> the motion for a return of licensed runs was repeated and carried, but seems to have produced no result during the year. In the meantime it was obvious that the squatting movement was rapidly spreading.

<sup>1</sup> For the Regulations carrying these provisions into effect, see *Gov. Gazette* (N. S. W.), 1848, sub dates 5th January, 31st March, and 24th November.

<sup>2</sup> *Gov. Gazette* (N. S. W.) of that date.

<sup>3</sup> Under this clause the lands within a radius of 5 miles from Melbourne and 2 miles from Geelong were excluded from lease by notice of 5th July 1849 (*Gov. Gazette*, 1849, p. 1007).

<sup>4</sup> See Regulations in full (*Gov. Gazette*, 29th March 1848).

<sup>5</sup> *Votes and Proceedings*, 1848, p. 74.



It was found necessary to pass an Act (11 Vic. No. 61) authorising the appointment of Commissioners (who must be carefully distinguished from the old "Commissioners of Crown Lands,")<sup>1</sup> to decide cases of disputed boundaries of runs. A new office had to be established in Sydney for the purpose of dealing with applications for licences.<sup>2</sup> And when the new return appeared, which it did on the 22d May 1849,<sup>3</sup> it was obvious that great strides had been made. The 54,000 square miles in the Sydney district of 1847<sup>4</sup> had risen to 68,000 in eighteen months,<sup>5</sup> whilst in the same period the squatting lands in Port Phillip District had risen from 30,000<sup>6</sup> to 46,000 square miles.<sup>7</sup> And this is all the more startling when we reflect that the progress of more settled colonisation had necessitated the inclusion of two new tracts of ten miles radius round Belfast and Warrnambool respectively, within the "Settled Districts,"<sup>8</sup> and the proclamation in Port Phillip of thirteen new counties,<sup>9</sup> which thereby fell into the list of "intermediate" lands. In the year 1849 the assessment on stock in the Sydney district produced upwards of £15,000, that in the Port Phillip District upwards of £11,000.<sup>10</sup> It is worthy also of note that early in the year 1849 the squatters of Port Phillip had petitioned the Crown for the extension to them of the elective franchise; and though the petition was not immediately granted, the answer of Lord Grey promised careful consideration for the request in the contemplated constitutional bill.<sup>11</sup>

<sup>1</sup> The latter were specially prohibited by the Act (§ 1) from serving as Boundary Commissioners.

<sup>2</sup> *Gov. Gazette* (N. S. W.), 1848, 29th Dec. (This alteration did not, however, affect Port Phillip.)

<sup>3</sup> *Votes and Proceedings*, 1849, i. sub date.

<sup>4</sup> *Ibid.* 1848, p. 375.

<sup>5</sup> *Ibid.* 1849, i. p. 793.

<sup>6</sup> *Ibid.* 1848, p. 376.

<sup>7</sup> *Ibid.* 1849, i. p. 793.

<sup>8</sup> By order in Council 11th August 1848. Proclaimed 12th March 1849. (*Votes and Proceedings*, 1849, i. p. 349.)

<sup>9</sup> By proclamation of 29th December 1848 (*Gov. Gazette*, 1848, 30th December). The counties were:—Follet, Dundas, Villiers, Ripon, Hampden, Heytesbury, Polwarth, Grenville, Talbot, Dalhousie, Anglesey, Evelyn, and Mornington.

<sup>10</sup> *Votes and Proceedings*, 1850, ii. 285.

<sup>11</sup> *Ibid.* 357. We shall see that in the next Constitution Act (§ 4 of 13 & 14 Vic. c. 59) the request was granted, though not at the instance of the Government. The petition of the Port Phillip squatters was presented by Lord Mounteagle. There were also amending orders in Council of

## C. QUIT-RENTS.

Fortunately the matter of the quit-rents can be disposed of in a comparatively short space. It does not specially affect Victoria, but is interesting as part of the history of the land system.

It will be remembered that the quit-renters were persons who, in the days before the Land Acts, had received grants of Crown land in fee-simple, upon the condition of payment of a small annual quit-rent.<sup>1</sup> One of the objects of the Government in making these grants had undoubtedly been to induce free settlers to undertake the management and employment of convicts, and thereby to relieve the Government of the cost of their maintenance. So long as the convict system lasted, the Government seems to have been very casual in demanding payment of the quit-rents; but when the system was abolished, the Crown considered itself entitled to demand the quit-rents from land which no longer saved expense to the Government. The quit-renters, on the other hand, complained that they were deprived of cheap labour just at the time when the demands on their pockets were increased. In some cases they refused to pay the quit-rents, and the question then became aggravated by the circumstance that the distresses levied by the Crown sometimes included stock not belonging to the owners of the land. This practice was, of course, strictly in accordance with the law, but its adoption created some ill-feeling.

The matter appears not to have been of any serious extent. On the 12th August 1845 the Legislative Council carried an Address to the Governor for a return of seizures made in the previous twelve months.<sup>2</sup> The return was promptly furnished, and it appeared that only nine seizures had been made, which had realised just £600.<sup>3</sup> In six cases stock belonging to persons other than the owners of the land had been taken.

18th July 1849, and 19th January 1850. But they did not effect any substantial changes.

<sup>1</sup> Cf. *ante*, p. 35. The term "quit-rents" (*quieti redditus*) was adopted, without much regard to propriety, from the old English manorial system, under which the tenant frequently compounded for his various labour and service dues by payment of an inclusive rent, and thereby became *quit* of further claims.

<sup>2</sup> *Votes and Proceedings*, 1845, p. 28.

<sup>3</sup> *Ibid.* p. 425.

Immediately upon the receipt of this return, the Council addressed the Governor requesting him to withdraw distress proceedings, pending the reply to the Crown Land Grievances Petition then before the Home government;<sup>1</sup> but the Governor declined to take any step which might lead to the inference that he doubted the rights of the Crown.<sup>2</sup>

The petition alluded to by this Address is that presented in 1844 to accompany the report of the Crown Lands Grievance Committee.<sup>3</sup> The report deals with the subject very briefly, resting its complaints principally on the facts that the extent to which the arrears had been allowed to accumulate had led purchasers to believe that they would never be demanded, and that the change in the convict system had deprived the quit-renters of cheap labour. It appears, by the evidence taken before the committee,<sup>4</sup> that at the close of the year 1843 the annual sum receivable from quit-rents throughout the colony was slightly over £10,000, and that the arrears amounted to upwards of £55,000. The committee, in its report, pledges itself to the statement that "much of the land is not now worth the amount of quit-rent due."<sup>5</sup> But it is significant that the Colonial Treasurer, the chief witness examined on this subject, declines to be responsible for this view,<sup>6</sup> remarking that no surrenders had been offered.

The report of the committee finally recommends<sup>7</sup> that all arrears of more than six years' standing shall be abandoned, and large reductions made in the quit-rents on country lands.

The reply of the Home government to the Land Grievances Petition<sup>8</sup> did not contain any special reference to the quit-rent clauses; but on the 9th October 1846 the Governor issued Regulations<sup>9</sup> which offered very liberal concessions. All lands upon which twenty years' quit-rents had been paid were to be thenceforth free, and those persons who had paid more than twenty years were to have the difference refunded. Holders upon whose lands twenty years' rent had not been paid were to be entitled to redemption upon completion of the twenty years,

<sup>1</sup> *Votes and Proceedings*, 1845, p. 85.

<sup>2</sup> *Ibid.* p. 98.

<sup>3</sup> *Ibid.* 1844, ii. p. 123, and *ante*, p. 98.

<sup>4</sup> *Votes and Proceedings*, 1844, ii. p. 218.

<sup>5</sup> *Ibid.* p. 133.

<sup>6</sup> *Ibid.* p. 215.

<sup>7</sup> *Ibid.* p. 138.

<sup>8</sup> *Ibid.* 1846, i. p. 59.

<sup>9</sup> *Gov. Gazette* (N. S. W.), sub date.

a substantial discount being offered to those who wished to redeem at once.

It appears that these Regulations were issued without instructions from the Home government, for when, at the close of the year 1847, the Governor was memorialised by the quit-renters for further reductions,<sup>1</sup> he at once expressed his inability to accede to the prayer of the memorial, on the ground that the Home government had disapproved of his previous concessions.<sup>2</sup> The memorial in question is hardly creditable to its framers, in some at least of its clauses. It points out that the squatters beyond the boundaries pay a smaller rent per acre than the amount of quit-rent, and thence draws the inference that the quit-renters are placed at a disadvantage as compared with the squatters. It hardly needs a specialist to see that a mere temporary occupation of land in the wilderness is worth less than the fee-simple ownership of land in a settled district. And again, when the memorial states that the quit-rent "applies almost exclusively to the purchasers of land to a large amount, the payment for which has been the chief means of promoting the immigration into the colony of shepherds and servants,"<sup>3</sup> it obviously means to suggest that the payment *for the lands on which the quit-rents are charged* has had this effect, whereas nothing beyond the quit-rents (and in many cases not even these) was ever paid to the Government for those lands.

In spite of the weakness of the case, however, the Legislative Council did not shrink from taking it up. On the 16th May 1848 it agreed to an Address,<sup>4</sup> framed on the motion of Mr. Cowper,<sup>5</sup> to be presented to the Crown, praying the absolute remission of all the quit-rents. In promising to forward the Address, the Governor repeated his former expression of belief that it would meet with little success at the hands of the Home government.<sup>6</sup>

The Governor's predictions were amply justified by the despatch in answer to the petition, which was laid before the Council on the 4th July 1849.<sup>7</sup> Earl Grey points out<sup>8</sup> that the question is really between one particular class of settlers and the whole community, for which the Crown, in the collection

<sup>1</sup> *Votes and Proceedings*, 1848, p. 75.

<sup>2</sup> *Ibid.* p. 75.

<sup>6</sup> *Ibid.* p. 135.

<sup>4</sup> *Ibid.* p. 74.

<sup>7</sup> *Ibid.* 1849, i. p. 105.

<sup>3</sup> *Ibid.* p. 76.

<sup>5</sup> *Ibid.* p. 59.

<sup>8</sup> *Ibid.* p. 489.

and expenditure of the Land Fund, acts as trustee. He points out that the assignment of convict labour, so far from being a burden on the quit-renters for which compensation had to be offered, was a most eagerly coveted boon. While as to the comparative dearness of lands held under the highest quit-rent of twopence an acre, Earl Grey shows that in a colony where the minimum price of Crown land is £1 an acre, and the average interest on money ten per cent, the man who pays twopence a year for his acre gets his land at about a twelfth of the price paid by the man who gives a lump sum of £1 for it. The only cases which deserve consideration are those in which the grantees of land emigrated on the distinct faith of the Regulations of the Home government<sup>1</sup> which promised the assignment of convict labour. Although these persons have had splendid bargains, they are entitled to all that the original improvidence of the Government promised them.

The latter promise was redeemed by a later despatch presented to the Council on the 21st August 1849,<sup>2</sup> which authorises<sup>3</sup> the Governor to remit the quit-rents to those persons who can prove that they emigrated on the faith of the Regulations of 1824,<sup>4</sup> provided they have in all other respects fulfilled the terms of the Regulations. But there are to be no half measures. The claimant must go entirely by the Regulations upon which he founds his claim, or abandon it altogether.<sup>5</sup>

### GENERAL

All these detailed grievances were, however, but indirect methods of approaching the real object of the Council, the acquisition of the control of the Land Fund. After many preliminary attempts, and much talk of a "compact" alleged to have been made between the Home and the Colonial governments,<sup>6</sup> the demand was boldly formulated by Mr. Darvall in his Land and Immigration resolutions of the 2d August 1850,<sup>7</sup>

<sup>1</sup> *Ante*, p. 34. Regulations of 1824.

<sup>2</sup> *Votes and Proceedings*, 1849, i. 191.

<sup>3</sup> *Ibid.* p. 488.

<sup>4</sup> *Ante*, p. 34.

<sup>5</sup> Another small item occurred in connection with so-called "quit-rents" at Parramatta and other towns in the years 1849-50. But these were really leasehold rents, and stood on a different footing. Cf. *Vol. of Australian Papers*, 1844-1850, in Melbourne Pub. Lib.

<sup>6</sup> *E.g.* in the report of 1844 (*Votes and Proceedings*, 1844, ii. p. 134).

<sup>7</sup> *Ibid.* 1850, i. 123.

and by Mr. Wentworth in his comprehensive resolutions of grievances of the 27th of the same month.<sup>1</sup> The latter, along with many other serious charges, assert—"That in the opinion of this House, the Imperial Act, 5 & 6 Vic. c. 36, which places the management of the lands of the Colony, and the appropriation of the revenues thence arising, beyond the control of this House, is a grievance; that inasmuch as the whole value of these lands has been imparted to them by the settlement of the Colonists, and by the labour and capital which they have expended upon them, and that the value consequently belongs to the whole Colony, it follows that the entire revenues thence arising, whether by sale or rent, ought of right to form part of the Ordinary Revenue, and to be subject to the sole control and appropriation of the Local Legislature."

We shall see what response this challenge met with in the new Constitution.

<sup>1</sup> *Votes and Proceedings*, 1850, i. p. 209.

## CHAPTER XII

### GOVERNMENT OFFICIALS AND ELECTIVE SEATS

DURING the period which we are now discussing, there arose a constitutional question which, though small in itself, involved great issues.

On the 28th May 1844 Sir Thomas Mitchell, the Surveyor-General of New South Wales, took his seat in the Legislative Council as an elective member for Port Phillip, having been elected on the resignation of Mr. Ebdon.<sup>1</sup> It will be remembered that by the existing Constitution Statute (the 5 & 6 Vic. c. 76) the Crown reserved the right<sup>2</sup> to appoint one-third of the members of Council, but with a proviso that not more than half of the Crown nominees should be holders of public office under the Crown. The Surveyor-General had not been included in the list of officials appointed to the non-elective seats; he could not be appointed by the Crown among its non-official nominees. But no express words of the Constitution Statute excluded him from choice by a constituency as an elective member.

But it is clear that doubts had been raised by the Governor as to the correctness of Sir Thomas Mitchell's action, for the latter resigned his seat in the Council on the 15th August following his election,<sup>3</sup> and, at the request of the Council,<sup>4</sup> Sir George Gipps laid before it an extract from a despatch of Lord Stanley<sup>5</sup> which contained the following expression of opinion—

“If Her Majesty's Officers think fit to assume relations and responsibilities, disqualifying them for the support of Her

<sup>1</sup> *Votes and Proceedings*, 1844, i. p. 9.

<sup>2</sup> *Votes and Proceedings*, 1844, i. p. 179.

<sup>3</sup> *Ibid.* 1845, p. 423.

<sup>4</sup> By § 1.

<sup>5</sup> *Ibid.* p. 57.

Majesty's Representative, they are of course perfectly free to do so, but having done so, cannot be permitted to retain their employment; otherwise, there would not only be an end to all concert and subordination in Her Majesty's service, but the sincerity and good faith of those by whom it is administered would be brought into serious discredit."

The subject was definitely taken in hand by the Council in the year 1846, when it passed an Act (10 Vic. No. 16), which excluded from membership of the Council all persons in receipt of salary or pension under schedules A, B, or C of the Constitution Statute, as well as all ministers of religion and government contractors. But the Act was reserved by the Governor for the royal decision, and apparently never became law, for in the year 1850 we find Mr. Wentworth bringing in a bill to disqualify ministers of religion.<sup>1</sup>

The question raised by this little incident may be looked at from two aspects. From the point of view of the Executive, the case was clear. The stability of English government in the colony depended chiefly upon the character and actions of its officials. These officials were, in most cases, men sent out from England, with salaries guaranteed by the Home government, responsible to it alone for their conduct, and entitled to its protection in the discharge of their duties. The position of the Legislative Council at this period was that of a critic, sometimes a rather severe critic, of the Executive. It was natural and right that it should be so. The colony was certainly not ripe for self-government, but it was awaking to a consciousness of its corporate existence, and gradually forming a public opinion which (as we are bound to believe) it expressed through the elective members of the Council. This public opinion, naturally looking at questions from a colonial standpoint, was not infrequently opposed to the policy of the Executive, which, as naturally, looked at matters from an Imperial standpoint. Had the elected officials sided with the colonial opinion in the Council, they would have disturbed the balance of power contemplated by the Constitution of 1842, and perhaps defeated the government, upon an important question, by means of its own servants.

If, on the other hand, the elected officials had sided with

<sup>1</sup> *Votes and Proceedings*, 1850, i. 44. This bill was, however, dropped.



the Government, an equal injustice would have been done to the Council, and to colonial views. The necessary link between the executive and the legislature was supplied by the nominee seats, and the colonists were entitled to the full benefit of the others. The dangers of an official House of Representatives had been fully realised in England, and had given rise to the famous Act of 1708,<sup>1</sup> which did not, however, technically apply to the legislature of New South Wales. On the latter account the Home government did not attempt directly to forbid to its officials the privilege of election, but it expressed its views pretty clearly in an indirect way. It is barely possible that the presence of elected officials in the Council might have led to a feeble attempt at a "Responsible" system, for constituencies might have unseated the official members if the Government policy displeased them. But this would have been a very poor system, for the real offenders, the important nominee officials, would have gone unscathed, while the Government would have cared little for a revenge which would have deprived its own officials of the power of voting against it. On the whole, there can be small doubt that the view of the Home government was right.

<sup>1</sup> 6 Anne (st. I.), c. 7.

## CHAPTER XIII

### SEPARATION

PERHAPS the question most deeply interesting to the settlers at Port Phillip during this second period was the question of separation from New South Wales. How it first arose it is impossible to say; it is comparatively easy to see that it must have arisen. It is an old view that popular governments are less fitted than autocratic systems for the rule of distant dependencies, and as the inhabitants of the old colony acquired more and more self-government, the Government of New South Wales became less capable of administering Port Phillip. The settlers at Melbourne bore easily enough the magisterial government dispensed from Sydney, so long as their fellow colonists of New South Wales and Van Diemen's Land lived under a similar system. But as the government at Sydney passed slowly under the control of the colonists there, the inhabitants of Port Phillip district began to envy the good fortune of their brethren, for their own share in the Legislative Council was too small to give them a feeling of proprietorship in it, and, as we shall see, the distance of Port Phillip from the seat of government soon rendered the actual representation a farce. The only possible alternative, that the colonists of Sydney should rule the settlers of Port Phillip, was hardly likely to be grateful to the latter.

As a matter of fact, events were clearly tending to separation. Almost every one felt that the colony of New South Wales was too large for united administration in any department. In the year 1846 there had been an abortive attempt to establish a new colony of "North Australia," by

proclamation of 9th November,<sup>1</sup> carrying into effect letters-patent of the 17th February, themselves issued under the 51st section of the Constitution Statute of 1842.<sup>2</sup> The new colony was to consist of all those parts of New South Wales which lay north of the 26th degree of south latitude. But apparently its existence was never recognised, and it was practically extinguished by a proclamation (16th January 1849) of Sir George Gipps, who, under letters-patent of the 3d April 1848, declared its territory to be again included in the colony of New South Wales.<sup>3</sup>

But the year 1847 witnessed a more permanent step in the process of disintegration. On the 25th June the old Bishopric of Australia<sup>4</sup> was divided into the four sees of Sydney, Newcastle, Adelaide, and Melbourne, the diocese of Sydney retaining the primacy over the newly-created sees, as well as those of Tasmania and New Zealand.<sup>5</sup> Inasmuch as, at this time, the Anglican Church, with other religious denominations, received government support, it is clear that the new step must have produced some moral result in strengthening the feeling for separation.

Moreover, from very early days, there had practically been a distinct executive in Port Phillip. The treasury at Melbourne was administered as a separate institution, and its accounts rendered separately to the Legislative Council. There was a Port Phillip Land Office, to which all applications for grants of Crown lands in the District had to be made. We have seen<sup>6</sup> that there was a separate branch of the Supreme Court for Port Phillip, with officials for whom the officials at Sydney were not responsible. The police and the Customs organisations were peculiar to the district.

The more direct movement may be said to have begun in the year 1843, when, in pursuance of an address carried on the motion of the well-known Dr. Lang,<sup>7</sup> the Governor laid upon the table of the Legislative Council a return of the revenue and expenditure of Port Phillip from its first settlement to the

<sup>1</sup> *Gov. Gazette* (N. S. W.), 1846, p. 1422.

<sup>2</sup> 5 & 6 Vic. c. 76.

<sup>3</sup> *Gov. Gazette*, 1849, p. 117.

<sup>4</sup> Founded January 1836. The bishopric of Tasmania had been separated in 1842.

<sup>5</sup> Copy of letters-patent in *Government Gazette*, 1st January 1848.

<sup>6</sup> *Ante*, pp. 49 and 50.

<sup>7</sup> *Votes and Proceedings*, 1843, p. 27.

close of the year 1842.<sup>1</sup> The return showed<sup>2</sup> that the general revenue (including that from squatting licences) had been £222,984, with an addition of nearly £400,000 from the sale of Crown lands, making in all a total of about £620,000. The local expenditure amounted to £255,000, or a sum slightly in excess of the general revenue, but of this expenditure a large part was for public works. The expenditure upon immigration to Port Phillip had, however, only been £204,000, so there was a balance on the whole account of upwards of £150,000. Against this balance some vague claims were made by the Sydney officials for a share of the cost of the central administration.<sup>3</sup>

Frequent motions on the same subject by Dr. Lang in the course of the same year produced little result, but in the following year (1844) Port Phillip itself took up the matter. There were two petitions, one from the District Council of the county of Bourke,<sup>4</sup> and one from the inhabitants of Port Phillip District generally,<sup>5</sup> asking openly for separation; and one from the Mayor and Council of Melbourne<sup>6</sup> which pointed in the same direction. The petition from the council of Bourke points to the practical existence of a separate administrative organisation in Port Phillip, the jealousy with respect to the appropriation of revenue, the impossibility of providing adequate representation of the district at Sydney, and the moral benefit of independence to the community, as grounds for its prayer.<sup>7</sup> That from the inhabitants generally urges also the independent origin of the Port Phillip settlement, and the precedent of Van Diemen's Land in 1824.<sup>8</sup> The petition of the Town Council deals purely with questions of financial justice.<sup>9</sup>

In the year 1845 the motion for returns of Port Phillip revenue was renewed,<sup>10</sup> and when the returns appeared,<sup>11</sup> they again showed a surplus, viz. of £24,000, on the two years' finance. But this time the surplus came from the general revenue, the expenditure from the Land Fund having greatly exceeded its receipts.<sup>12</sup> The same year also witnessed a petition

<sup>1</sup> *Votes and Proceedings*, 1843, p. 35.

<sup>2</sup> Copy in *ibid.* p. 461.

<sup>3</sup> *Ibid.* p. 461.

<sup>4</sup> *Ibid.* 1844, i. p. 79.

<sup>5</sup> *Ibid.* p. 135.

<sup>6</sup> *Ibid.* p. 217.

<sup>7</sup> *Ibid.* ii. p. 81.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* p. 89.

<sup>10</sup> *Ibid.* 1845, p. 147.

<sup>11</sup> *Ibid.* p. 181.

<sup>12</sup> Returns in *ibid.* p. 463.

from the Town Council of Melbourne praying for an extension of the representation, so as to secure to Port Phillip a fair proportion with the whole colony.<sup>1</sup>

It would not be easy to trace the local history of the question for the next two years without travelling beyond the scope of this work ; but that the matter had engaged the serious attention of the colonial government is manifest from the second paragraph of the very important despatch from Lord Grey which was laid before the Legislative Council on the 31st March 1848.<sup>2</sup> This paragraph refers to six despatches from Sir George Gipps and his successor, Sir Charles Fitz Roy, and to numerous extracts from the Minute Book of the Executive Council, all bearing upon the question of separation. Unfortunately, these documents are not accessible, but from Lord Grey's despatch we gather that the separation movement had been favoured by all the members of the Executive Council except two.<sup>3</sup>

The despatch itself is invaluable as a key to the policy of the Home government with regard to New South Wales and Port Phillip during the next few years. Lord Grey says plainly that England is prepared to grant separation ; upon the great principle of local government. This principle has evidently been misapplied in the District Council scheme ; it shall be tried again under more favourable auspices.

But the document goes much further. Along with separation, Lord Grey contemplates "a return to the old form of colonial constitution."<sup>4</sup> The Legislative Council at Sydney has been an attempt to combine the nominee and elective principles in a single chamber. The results have not been encouraging, and it is proposed to revert to the simpler method of two Houses.

Moreover, the question of municipalities is to receive attention. The evidence from America and Canada is too strong to allow the Imperial Government to abandon entirely all attempts at municipal institutions simply because the scheme of 1842 has proved abortive. Nay, if it be necessary, in order to secure due weight and consideration for the municipalities, the Imperial

<sup>1</sup> *V. and P.* 1845, p. 98.

<sup>2</sup> Copy in *ibid.* 1848, p. 177.

<sup>3</sup> The Colonial Treasurer and the Bishop of Australia.

<sup>4</sup> *V. and P.* 1848, p. 178.

Government will be prepared to consider a scheme for making them "bear to the House of Assembly the relation of Constituents and Representatives."

But, above all, the despatch alludes, in no obscure terms, to the project of co-operation amongst the legislatures of the various Australian colonies, in the matters of customs dues, postal and other communication, and the like; and "that part of the plan which respects the creation of a central authority, implies the establishment of the system of Representative Legislation throughout the whole of the Australian Colonies, including Van Diemen's Land, and South and Western Australia."<sup>1</sup> Questions of territorial revenue, adjustment of boundaries, and discriminating duties will also require careful attention.

It is not surprising that such a catastrophic missive should provoke considerable comment. In Committee of the whole the Legislative Council agreed (by 19 votes to 3) that the proposal of separation was injurious, or at least premature.<sup>2</sup> The question of the two Houses produced a close division, but ultimately there was a majority of one vote in favour of Lord Grey's proposal.<sup>3</sup> By sixteen votes to five the Council affirmed its former view that the approaching changes in the constitution should place the control of the territorial revenue, *or* of the Civil List, in the hands of the colonial legislature.<sup>4</sup> And by fourteen votes to five it agreed to a resolution strongly condemning the contemplated action of the Imperial Government in submitting the proposed changes to parliament before consulting the colonists.<sup>5</sup>

But here the Council seems to have found itself going rather too far, and the proceedings were discontinued.<sup>6</sup> Enough had been done, however, to show its feeling with regard to the great question of separation.

Outside the Legislative Council the feeling was also strong. Some of the petitions which Lord Grey's despatch evoked do

<sup>1</sup> *Votes and Proceedings*, 1848, p. 179.

<sup>2</sup> *Ibid.* p. 532. (Sir Charles Fitz Roy's despatch of 11th August 1848 states that a resolution in favour of separation "was carried without observation." But this does not agree with the official records. Cf. despatch in *V. and P.* 1848, p. 685. See also a repetition of this statement in the report of the Board of Trade of 4th April 1849, in *V. and P.* 1849, i. 703.)

<sup>3</sup> *Ibid.* 1848, p. 533.

<sup>5</sup> *Ibid.* 1849, vol. i. pp. 685-693.

<sup>4</sup> *Ibid.*

<sup>6</sup> *Ibid.* 1848, 9th May.

not refer to the question, but many of the New South Wales petitions condemn it. Almost all condemn, some in violent language, the hint of the threatened change in the position of the municipalities, which is regarded as a menace to the most valued rights of representation. Needless to say that the Port Phillip petitions are ardently in favour of separation, but towards the rest of Lord Grey's proposals they are, at least, lukewarm.<sup>1</sup>

Shortly afterwards, however, the colonists at Port Phillip determined to give a practical proof of the necessity of separation, and the manner of their proof is somewhat interesting.

At the close of the session of 1848 the Legislative Council had been dissolved, and, in the month of July, writs for the Port Phillip and Melbourne elections were sent down in the usual way. Tired of what they deemed the needless delays in the separation matter, the colonists suddenly determined to show their abhorrence of the existing system by a practical *reductio ad absurdum*. The official meetings of electors were held in due course, but at that for the District the only candidate proposed was withdrawn at his own request, and at the election for Melbourne the meeting returned Earl Grey, the Secretary of State for the Colonies, as the duly elected candidate.

The astonishment of the authorities may well be imagined, but their proper course of action was by no means so obvious. By old English theory, a constituency which failed to send members to parliament could be heavily fined, but there was no pretence for saying that, even as a matter of strict law, that rule applied in Australia. The electoral rights and duties of New South Wales were purely statutory, and circumstances had so changed since the days of the old parliaments, that no legislator dreamed of providing for the case of a refusal to elect. On the other hand, though Lord Grey was ineligible, as a peer, for a seat in the English House of Commons, there was no law which prevented him sitting in the Legislative Council of New South Wales, and it could not be presumed that he had no landed qualification in the colony.<sup>2</sup> That point could only be settled when he claimed to take his seat.

<sup>1</sup> Cf. petitions in *V. and P.* 1849, i. pp. 681-683.

<sup>2</sup> *Vide* opinion of law officers, *ibid.* p. 695.

If the object of the colonists at Port Phillip were the embarrassment of the government, they certainly chose their measures well. But it is hard to see how they could benefit themselves by the new manœuvres.

The official view, taken by the Colonial Government, was that the electors had acted upon a sudden impulse, and would soon repent of their rashness.<sup>1</sup> There is considerable colour for the view, for it is fairly clear that up to the morning of the 19th July (the day before the District election) candidates were in the field in the usual way,<sup>2</sup> and the notices of the meeting which appeared in the papers of the 21st betray a good deal of surprise. One of the two leading Melbourne journals of the day<sup>3</sup> heartily approved of the scheme, the other condemned it as suicidal.<sup>4</sup>

Nevertheless, there was a good deal of determination in the minds of the supporters of the movement. The Port Phillip electors prepared a long memorial, in which a statement of their grievances and a full account of the election proceedings culminated in a prayer for immediate separation. The memorial was adopted at a public meeting, and signed by the Mayor of Melbourne.<sup>5</sup> One of the minor influences at work seems to have been hostility to the great squatters, who, as such, had no votes, but who, it was alleged,<sup>6</sup> secured the return of their nominees, and by their means even controlled the government in the squatting interests. It was hoped that the move would frighten the squatters, by lessening their legislative influence over the government, and there is some slight support for the view in the fact that a meeting to denounce the scheme was summoned at the great squatting centre of Geelong. The *Argus*, which represented the anti-squatting interests, accused the squatters of combining to keep up the sale price of grazing land to £1 an acre, presumably to minimise the prospects of the amount of licence lands being reduced.<sup>7</sup>

The Government, however, acted upon its own view, and

<sup>1</sup> Letter of Sir Charles Fitz Roy (*Votes and Proceedings*, 1849, i. p. 693).

<sup>2</sup> Messrs. Boyd, Foster, and Bogue (cf. *Port Phillip Patriot* for July 14, 17, and 19).

<sup>3</sup> The *Melbourne Argus* (cf. 21st July).

<sup>4</sup> The *Port Phillip Patriot* (same date).

<sup>5</sup> Copy in *Votes and Proceedings*, 1848, i. p. 695.

<sup>6</sup> *Argus*, 28th July.

<sup>7</sup> *Argus* of August 1.



ordered a re-election to take place for the District, making Geelong the chief polling-place.<sup>1</sup> The result justified the measure, for at the new election held in October<sup>2</sup> five members were duly returned.<sup>3</sup>

But the agitation had done its work. The memorial sent home to Earl Grey had stated that—"Our six seats during five years have been occupied by no fewer than seventeen members. . . . Two elected resident members never sat at all, and but one resident member ever sat out more than a single session."<sup>4</sup> This was enough to convince any impartial person, and doubtless the statement had weight with Lord Grey, for within a few weeks of its receipt we find the Cabinet<sup>5</sup> approving of a very elaborate report of the Board of Trade, which dealt fully with the question.<sup>6</sup> This report bears date the 4th April 1849, and was drawn up in pursuance of an order in Council of the preceding 31st January, referring to the Board for consideration the correspondence between Lord Grey and the Australian Governors.<sup>7</sup> It is worthy of the most careful study, as impartial evidence of the views of English statesmen towards the Australian colonies in 1849, and as the basis of subsequent legislation.

Upon the immediate question of separation the report is very clear. The earnest desire of the Port Phillip settlers and the difficulties of representation at Sydney combine to render the step inevitable, and Her Majesty is requested to sanction it formally by bestowing her name upon the colony to be newly created. It is especially to be noted, in view of subsequent events, that the Board of Trade at this time entertained no doubt upon the afterwards vexed question of boundaries. "The line of demarkation between New South Wales and Victoria would coincide with the existing boundary between the two districts into which, for certain purposes, the Colony is already divided. *It would commence at Cape How, pursue a straight line to the nearest course of the river Murray, and follow the*

<sup>1</sup> *Gov. Gazette*, 25th August 1848.

<sup>2</sup> The time had been extended by proclamation (*ibid.* 29th September 1848).

<sup>3</sup> *Ibid.* 24th October 1848.

<sup>4</sup> *V. and P.* 1849, i. p. 656.

<sup>5</sup> *I.e.* nominally, of course, the Privy Council.

<sup>6</sup> As to the nature of this latter body, cf. *ante*, pp. 2-4.

<sup>7</sup> Copy of report in *V. and P.* 1849, i. p. 702.

*course of that river as far as the boundary which now divides New South Wales from South Australia."*<sup>1</sup>

But though we are dealing, in this chapter, chiefly with the one subject of separation, it is convenient here also to state shortly the other views of this important document, upon subjects intimately connected with it.

Briefly, then, after much consideration, the Board advises the retention of the single chamber form in the constitutions both of the old and the new colony. Its own opinion, backed by most authorities in England and that of the Governor of New South Wales,<sup>2</sup> points the other way, but deference to the wishes of the colonists,<sup>3</sup> and the pledge of the Secretary of State,<sup>4</sup> forbid the present introduction of the bi-cameral system.

With regard to the abortive scheme of local government contemplated by the Act of 1842, the report<sup>5</sup> deprecates the formal abolition of the existing District Councils, but suggests a suspension of the scheme until it is set in motion by local request. To stimulate such request a most important proposal is made—viz. to allow each local body to expend one-half of the revenue from Crown land sales within its district in the effecting of public works, instead of having the expenditure effected by the central government at Sydney.<sup>6</sup>

Upon the subject of public worship the report recommends that the four churches then at present temporarily endowed from the general revenue<sup>7</sup> shall have their endowments guaranteed to them in perpetuity by charges on the revenues of their respective colonies,<sup>8</sup> the proportions being slightly readjusted in accordance with the latest statistics, and the colonial legislatures being left free to endow any other religious bodies.<sup>9</sup>

The vexed question of the Civil List also receives attention. It had long been a complaint of the colonial legislature that by the reservations of the constitution of 1842 they were deprived of all control over a large portion of the general revenue, as well

<sup>1</sup> *V. and P.* 1849, i. p. 706.

<sup>2</sup> Cf. *ibid.* p. 309.

<sup>3</sup> *Ibid.* p. 704.

<sup>4</sup> In Lord Grey's despatch of 31st July 1848, *ibid.* p. 309.

<sup>5</sup> *Ibid.* p. 706.

<sup>6</sup> P. 707.

<sup>7</sup> *I.e.* Church of England, Church of Scotland, Roman Catholics, Wesleyans.

<sup>8</sup> It was only in New South Wales that any such provision had been made, and the new scheme is therefore only to apply to N. S. W. and Victoria.

<sup>9</sup> P. 709.

as over the Land revenue of the colony. The report proposes that this restriction shall no longer prevail, but that the local legislature shall have power to alter, *by statute specially reserved for the royal assent*,<sup>1</sup> the appropriations for the Civil List.<sup>2</sup>

The question of customs duties leads up to the important question of a General Assembly. The Board is so strongly convinced of the importance of an uniform tariff for Australia that it recommends its promulgation by Imperial statute, with power to alter it conferred upon a general Australian Assembly. For this purpose one of the Australian Governors is to be constituted Governor-General, and he is to have power to summon a House of Delegates elected by the various Australian legislatures. The general body thus created is to have power to legislate for all Australia in matters of Customs and harbour dues, mails, means of transport, beacons and lighthouses, a general Supreme Court of Appeal, and the like, as well as in any matter unitedly submitted by all the colonial legislatures.<sup>3</sup>

Such were, in outline, the features of the great Report of the Board of Trade, which, being formally approved by the Privy Council on the 1st May 1849, became the basis of the approaching legislation.

A copy of the Report was at once forwarded to the colony by Lord Grey, with a despatch which promised the immediate introduction into parliament of a bill to carry out its suggestions. On the 26th September 1849 these documents were laid before the Legislative Council.<sup>4</sup> But before their receipt<sup>5</sup> the Council had practically affirmed its recognition of the separation claim by agreeing to a resolution proposed by Mr. Foster, "That in the opinion of this Council all revenues raised in Port Phillip after the 1st January 1850, whether General or Territorial, should be expended for the benefit of that District."<sup>6</sup>

These events practically settled the question. In the year 1850 two despatches were received from Lord Grey, in which the Secretary of State regrets the unavoidable delay of another year in the passing of the Constitution Bill, and makes two rather important announcements with regard to the plans of

<sup>1</sup> Note how different this is from the Council's ideal of an annual vote. It is, however, in accordance with English precedent.

<sup>2</sup> P. 709.

<sup>3</sup> P. 710.

<sup>4</sup> *V. and P.* 1849, i. 279.

<sup>5</sup> *Viz.* on 7th August 1849.

<sup>6</sup> *V. and P.* 1849, i. 162.

the Imperial government. The new constitution will not provide the uniform tariff, but will leave it to the General Assembly, while the question of the elective franchise will also be left to the colonial legislatures.<sup>1</sup>

One other point is worth noticing. On the 18th July 1850 the Legislative Council adopted an Address to Her Majesty embodying the resolution that "the reserving to the Secretary of State for the Colonies the gift of appointments to public offices in New South Wales is inexpedient, and that from the advanced state of society in this colony the patronage should be absolutely vested in the Local Executive."<sup>2</sup> This is a foreshadowing of a still greater change, a change which is not to come for a few years yet. It is significant as showing the direction in which men's thoughts are turning—to the full responsibility of Cabinet government on the old model.

But for the present we have enough on hand. Separation has come, with its need for new arrangements and divisions. What these arrangements are we shall see when we deal with the new constitution. Meanwhile the visitor to the Melbourne Public Library may read, in framed broadside, how, on the 11th November 1850, came the glorious news to Melbourne that the Separation Bill had at last emerged from the furnace of the Imperial parliament, and how, by the proprietor of the *Melbourne Morning Herald*, the citizens of "the long oppressed, long buffeted Port Phillip" were invited to make merry and rejoice.

<sup>1</sup> Despatches in *V. and P.* 1850, i. pp. 353, 355.

<sup>2</sup> *V. and P.* 1850, i. 78.



## CHAPTER XIV

### GENERAL CONDITION OF PORT PHILLIP IN 1850

At this crisis in the history of Victoria it may be well to turn aside for a moment from the strictly constitutional line, and take a bird's-eye view of the general state of the community.

On the 31st December 1850 there were 69,739 persons in Port Phillip, and these had risen to 77,345 by the 1st March following. At the latter date the local distribution was as follows :—

Melbourne	.	.	.	.	.	23,143
Geelong	.	.	.	.	.	8,291
Other places	.	.	.	.	.	45,911
Total						77,345

Classed according to occupations, the population was divided thus :—

Commerce . . .	5,000	} (In round figures.)
Agriculture . . .	3,900	
Pasture . . .	7,300	
"Other labourers" . .	6,000	
Mechanics and Artisans .	3,400	
Domestic service . .	4,600	
"Other occupations" .	3,500	
(Unclassed) . . .	41,000	

The most striking results are, however, obtained from the records of sex and age. The males exceeded the females by fifteen thousand (or more than one-fifth of the whole community), and of the total number of males in the community, more than one-half were between the ages of 21 and 45. In other words, the masculine vigour available was in an enormously high ratio compared with the average community.

There were about 11,000 houses in Port Phillip, of which some 5000 were of stone or brick, and the remainder of wood. Of the more substantial class, nearly four-fifths were in Melbourne and Geelong.

The live stock of the community comprised about six and a half million head, of which about *seven-eighths* were "beyond the settled districts," i.e. in the great squatting localities of Gippsland, Murray, Portland Bay, Westernport, and Wimmera. Six million head were sheep, as might have been expected from their locality, and about 378,000 were cattle.

The total revenue for the year 1850 amounted to close upon £260,000, of which £123,000 was "general" and upwards of £136,000 "territorial." The chief items of the general revenue were customs (£76,000), assessment on stock (£12,000), and "licences"<sup>1</sup> (£10,000). The principal heads of the territorial revenue were sale of Crown lands (£29,000), land and immigration deposits (£92,000), and leases and licences to occupy (£12,000). The area of Crown land actually granted during the year was 40,000 acres, making a total of 354,000, or about 554 square miles, since the first settlement;<sup>2</sup> but it is impossible to make a fair estimate of the sale value per acre upon these figures, inasmuch as the receipts often represent deferred payments and deposits.

The expenditure from the general revenue was about £95,000, and from the territorial about £96,000. Of the latter item £81,000 represents immigration—far more than the due proportion, but probably the large amount is due to debts of previous years. Upon the whole the revenue exceeds the expenditure by £69,000—considerably over 30 per cent.

The industrial pursuits of the community were represented by forty-six factories actually at work—nineteen in Melbourne, and fifteen others in the county of Bourke. There were, of these, fourteen breweries, thirteen tanneries, and eight salting establishments.

The imports of the community amounted in value to £745,000, the principal heads being—clothing, malt liquors and spirits, cottons and haberdashery, hardware, and tobacco. Of these imports nearly £700,000 value came from Great

<sup>1</sup> I.e. presumably publicans' licences.

<sup>2</sup> This total, however, does not include the free grants for public purposes.

Britain. The exports were just over a million sterling, chiefly, of course, wool, though tallow counted for something substantial. The exports, with trifling exceptions, all went to Great Britain.

The shipping, inwards and outwards, for the year 1850 amounted to about 500 vessels, with a burden of something less than 100,000 tons. More than four-fifths of these were British vessels.

The convictions for crime during the year had amounted to 111, but of these 102 were for felonies, and we cannot help suspecting either that the convictions for lighter offences were not fully reported, or that the administration of justice in minor cases was somewhat intermittent.

The picture of Port Phillip which these figures draw is very different from the Victoria of to-day. At the time of separation Port Phillip was a great pastoral province, whose wealth lay in its flocks and herds. One quarter of its male population was actually engaged in pastoral and agricultural pursuits, and less than one-fifteenth in manufactures. This is a strange picture for one accustomed to think of Victoria as a great country of artisan interests, striving to build up a giant system of mechanical industries, and viewing all things from the point of view of town life. In fact, Port Phillip in 1850 was on the verge of a compound revolution, which was to change not only her political machinery, but her social and industrial life.<sup>1</sup>

<sup>1</sup> The figures in this chapter have been taken mainly from two contemporary sources of information—the returns in *V. and P.* (N. S. W.), 1851, vol ii., and in *Victorian Government Gazette*, 1851. They have also been compared with the valuable tables contained in Mr. Hayter's *Victorian Year Book* for 1886-87.

**PART III**  
**SEPARATE GOVERNMENT**





## CHAPTER XV

### THE NEW CONSTITUTION<sup>1</sup>

THE 13 & 14 Vic. c. 59 received the royal assent on the 5th August 1850. It is entitled "An Act for the better Government of Her Majesty's Australian Colonies," and we must therefore be careful to remember that it was not concerned solely, or even mainly, with the colony of Victoria. Still, it will be better for us to analyse first the sections which deal specially with Victoria, passing then to the provisions affecting also other colonies, and reserving comment for the end of the chapter.

The first section, after a somewhat lengthy summary of the statutory history of government in New South Wales from the 9 Geo. IV. c. 83 downwards, enacts that after certain provisions have been made by the Governor and Legislative Council of New South Wales, and upon the issuing of the writs for the first election in pursuance thereof, the District of Port Phillip shall be separated from the colony of New South Wales, and shall be erected into a separate colony under the title of the colony of Victoria.<sup>2</sup> The new colony is described as being "bounded on the north and north-east by a straight line drawn from *Cape How* to the nearest source of the River *Murray*, and thence by the course of that river to the eastern boundary of the colony of South Australia."

There is to be in the new colony of Victoria a Legislative Council, consisting of such number of members as the existing

<sup>1</sup> From this point the references to the volumes of *Votes and Proceedings*, *Hansards*, *Colonial Statutes*, and *Government Gazettes* will indicate those of Victoria, unless otherwise qualified.

<sup>2</sup> Cf. also § 5.

legislature of New South Wales shall determine.<sup>1</sup> One-third of these members are to be nominated by the Crown, the other two-thirds to be elected by the inhabitants.<sup>2</sup> Moreover, the legislature of New South Wales is to divide the colony of Victoria into electoral districts, and to make all necessary provisions for the conduct of elections.<sup>3</sup> The writs for the first elections in Victoria are to be issued (in default of special nomination by the Crown) by the Governor of New South Wales.<sup>4</sup>

The electoral franchises for the Victorian Legislative Council are to be four in number—

1. Ownership of a freehold within the electoral district of the clear value of £100.
2. Householding resident occupation of dwelling-house, value £10 per annum, within the electoral district.
3. Holding of a pasturing licence within the electoral district.
4. Ownership of a leasehold estate in possession, with three years to run, of the value of £10 per annum, within the electoral district.

But these franchises are only available for male natural born or naturalised subjects of Her Majesty and denizens of New South Wales, of the age of 21 years, and the qualification under the first two must have existed for six months prior to the registration or issue of writs.

The disqualifications for voting are—

1. An existing conviction for treason, felony, or infamous offence in any part of the British dominions.
2. Non-payment of rates and taxes due in respect of the qualifying interest more than three months before election or registration.<sup>5</sup>

The legislature of the new colony is to have full power, when constituted, to make any alterations in the mode of election and distribution, and even to increase the number of members of the Legislative Council, the due proportion of nominee and elected members being maintained.<sup>6</sup> But until such alteration, the existing provisions of the 5 & 6 Vic. c. 76, and the 7 & 8 Vic. c. 72, are to be in force.<sup>7</sup> Moreover, by a later section, the legislature is empowered to make radical changes in the constitution, by the creation of a second chamber,

<sup>1</sup> § 2.

<sup>2</sup> *Ibid.*

<sup>3</sup> § 3.

<sup>4</sup> *Ibid.*

<sup>5</sup> § 4.

<sup>6</sup> § 11.

<sup>7</sup> § 12, cf. *ante*, pp. 70, 71.

and the like; but measures of this class must be specially reserved for the royal assent.<sup>1</sup>

The normal functions of the new legislatures created by the statute are defined by the very wide permission "to make Laws for the Peace, Welfare, and good Government of the said Colonies respectively, and, with the Deductions and subject to the Provisions herein contained, by such Laws to appropriate to the Public Service within the said Colonies respectively the whole of Her Majesty's Revenue within such Colonies arising from Taxes, Duties, Rates, and Imposts levied on Her Majesty's Subjects within such Colonies."<sup>2</sup> Thus the new legislature of Victoria may be said to have started with a general power of legislation, and a special power of appropriation of the general revenue. The specific restrictions upon these powers are as follow—

1. No law is to be "repugnant to the Law of *England*."
2. No law is to "interfere in any manner with the Sale or other appropriation of the Lands belonging to the Crown within any of the said Colonies, or with the Revenue thence arising."
3. No law is to appropriate to the public service any sum of money unless the object has been specifically recommended to the Council by the Governor on Her Majesty's behalf.
4. No law is to authorise the issue of public monies except in pursuance of warrants under the hand of the Governor, directed to the Treasurer.<sup>3</sup>

The statement of the three last restrictions brings us naturally to the consideration of the revenue clauses of the new statute. We have just seen that the Crown expressly retains control of the Land revenue. But in other respects the powers of the colonial legislature are very wide. It may impose any customs duties it may think fit, upon British as well as foreign goods, save only that it must not impose differential rates,<sup>4</sup> levy duties upon supplies imported for land or naval forces, nor infringe the provisions of any treaty existing between the Crown and a foreign power.<sup>5</sup> With regard to the Civil List also, its powers are greatly enlarged. For Victoria the legislature is required at first to vote an annual grant of £20,000 for the expenses of government and public worship.<sup>6</sup>

<sup>1</sup> § 32. The provisions of 5 & 6 Vic. c. 76 and the 7 & 8 Vic. c. 74 as to bills reserved for the royal assent are continued by § 33.

<sup>2</sup> *Ibid.*

<sup>4</sup> § 27.

<sup>5</sup> § 31.

<sup>6</sup> § 17, Sched. (B).

But the salaries of the judges may be altered by the legislature unreservedly (vested interests excepted),<sup>1</sup> as well as those of the political officials, while the Governor must account to the Council for the details of expenditure, and, in varying the distribution of the sum granted, must not increase the total amount payable, nor contravene any provision made by the legislature for any permanent appropriation.<sup>2</sup> The Governor must also, at the beginning of every session, lay before the Council the estimates for the Government service during the ensuing year.<sup>3</sup> On the other hand, bills altering the salary of the Governor, or the amount distributable for the maintenance of public worship, must be specially reserved.<sup>4</sup>

With regard to the administration of justice, it is provided<sup>5</sup> that Her Majesty may by letters-patent create a court, to be called "The Supreme Court of the Colony of Victoria," to be holden by one or more judges, with the powers of the Supreme Court of New South Wales under the 9 Geo. IV. c. 83. From the date of the constitution of such court, the powers of the Supreme Court of New South Wales, so far as Victoria is concerned, are to be vested in it; but, until its constitution, the existing arrangements are to remain in force.<sup>6</sup> The colonial legislature is also expressly empowered to make further provisions for the administration of justice.<sup>7</sup> The laws now operating by virtue of any authority in the territories comprised in the new colony of Victoria are to continue to be binding therein until altered by the proper authority, except that any powers vested in the Governor of New South Wales are to be deemed transferred to the Governor of Victoria.<sup>8</sup>

The statute deals also with the question of local government, but that portion of it will be discussed in a subsequent chapter.

With those sections of the statute which refer exclusively to other colonies, we have nothing specially to do. We may note, however, that they contemplate the establishment in Van Diemen's Land and South Australia of Legislative Councils similar to those provided for New South Wales and Victoria, and, upon certain conditions, a similar establishment in Western Australia. Also it is worth remembering that the powers given

<sup>1</sup> § 18.<sup>2</sup> § 18.<sup>3</sup> § 19.<sup>4</sup> § 18.<sup>5</sup> § 28.<sup>6</sup> § 28.<sup>7</sup> § 29.<sup>8</sup> § 25.

to the Crown by the Act of 1842<sup>1</sup> to separate from New South Wales any portion of territory north of the *twenty-sixth* degree of south latitude, under which power the abortive colony of North Australia had been founded,<sup>2</sup> were renewed and extended by the statute of 1850. Her Majesty is empowered<sup>3</sup> from time to time upon the petition of inhabitant householders of territory north of the *thirtieth* degree of south latitude to detach such territory from the colony of New South Wales, and to erect it into a separate colony or colonies, or annex it to any colonies to be established under the powers of the Act of 1842, and such new colonies are empowered to adopt the form of constitution contemplated by the statute of 1850.<sup>4</sup>

But there is one section of the latter enactment which touches Victoria specially. This section, the thirtieth, empowers Her Majesty, upon the petition of the Legislative Councils of New South Wales and Victoria, or one of them (with notice to the other), to alter, by order in Council, the boundaries laid down by the statute, and to vest territory in accordance with the alteration.

If the changes of 1842 failed to excite attention in the mother country, the same complaint cannot be made of the attitude of the English statesmen of 1850. In spite of the Pacifico splutter and the vagaries of Lord Palmerston, in spite of the Irish distress and the formation of the Tenant League, in spite of Papal "aggression" and Jewish disabilities, Parliament found time to discuss with care and animation the Bill for the Government of the Australian Colonies. Lord John Russell, the premier of 1850, was one of the earliest English statesmen to recognise the importance of Australia. He took an active part in carrying the measure, and the great names of the day, Grey, Hume, and Roebuck, as well as the men of the future, Gladstone and Disraeli, also interested themselves in the matter. There was a formal "protest" upon it in the

<sup>1</sup> 5 & 6 Vic. c. 76, §§ 51 and 52.

<sup>2</sup> *Ante*, p. 125. The colony will be found delineated in Black's *General Atlas* (ed. 1857).

<sup>3</sup> 18 & 19 Vic. c. 59, § 34.

<sup>4</sup> This section obviously contemplated the separation of the Moreton Bay District, much of which lay between the twenty-sixth and thirtieth degrees of latitude. But when Queensland was actually made a separate colony, it was constituted under the powers of the 18 & 19 Vic. c. 54 (cf. 24 & 25 Vic. c. 44, preamble).

House of Lords, and in many of the divisions the numbers were large and evenly divided.

The measure seems to have been first introduced by Mr. Under-Secretary Hawes, in the House of Commons, on the 4th June 1849.<sup>1</sup> In asking leave to bring in the bill, Mr. Hawes announced that it had three great objects; the separation of Port Phillip from New South Wales, the establishment in each of the other Australian colonies of a constitution similar to that then in force in New South Wales, and the creation of a federal union amongst the colonies for general purposes. As minor objects, it was desired to give the colonies power to initiate a change to two-chambered constitutions, to establish an uniform tariff, and to introduce an amended scheme of local government. Mr. Gladstone, as one of the leaders of the Tory Opposition (he had been in office under Sir Robert Peel three years before), professed a general approval of the measure, but strongly recommended an extension of the existing franchise, and an attempt at two-chamber constitutions (especially in view of a federal union), and strongly deprecated any attempt to fix a general tariff, either by the Imperial Parliament or a General Assembly.<sup>2</sup> After a few more observations, including a speech from Lord John Russell leaning decidedly against the two-chamber principle, leave was given to introduce the bill,<sup>3</sup> which was read a first time on the 11th June,<sup>4</sup> but did not get any further in the session. A similar fate befell another bill introduced on the 26th June.<sup>5</sup>

But early in the session of 1850 a new bill was introduced by the premier. In a long and interesting speech, Lord John Russell reviewed the history of the Colonial Empire, and explained the reasons which had led the Government to adopt its present policy. He admitted that the new bill differed from its predecessor in one important matter, in that it left to the colonists themselves the fixing of their own customs dues. The eager zeal of the new British convert<sup>6</sup> was not to impose free trade upon the unwilling colonists. "That, I say, must in future be a cardinal point in our policy."<sup>7</sup> At the same

<sup>1</sup> English Hansard (3d series), cv. 1125.

<sup>2</sup> *Ibid.* p. 1128.

<sup>3</sup> *Ibid.* p. 1138.

<sup>4</sup> *Ibid.* p. 1368.

<sup>5</sup> *Ibid.* cvi. p. 922.

<sup>6</sup> Sir Robert Peel had practically given the death blow to protection in England by carrying, in 1846, his bill to abolish the corn duties.

<sup>7</sup> Hansard, vol. cviii. p. 565.

time, it is quite clear that the premier hoped that the colonies would follow the example of England's fiscal reforms.

On one other important point, Lord John Russell made a declaration. He was willing to leave the long-vexed question of the Land revenue to be settled by the federal assembly which the bill proposed to authorise.<sup>1</sup> This offer, though it was not taken advantage of, must be carefully borne in mind in estimating the conduct of the Imperial Government on the Land question.

The premier was followed by Sir William Molesworth, Mr. Roebuck (as spokesman of "The Colonial Reform Association"), Mr. Gladstone, and Mr. Joseph Hume, all of whom, on one ground or another, felt bound to oppose the Government, though they professed to agree in the main with the bill. Mr. Gladstone, who had the support, amongst others, of Mr. Francis Scott, the official agent for the colony of New South Wales, was strongly opposed to the creation of single-chamber legislatures, but his view was negatived in committee by 198 votes to 147.<sup>2</sup> In the Lords a similar proposal by Lord Mounteagle was only lost by two votes.<sup>3</sup> Mr. Gladstone also proposed to introduce into the bill certain clauses conferring powers of self-government on the Anglican Church in Australia, but he was defeated by 187 votes against 102,<sup>4</sup> and the Bishop of Oxford's attempt in the same direction in the House of Lords met with a still worse fate.<sup>5</sup> The General Assembly clauses in the bill were easily carried in a thin House of Commons,<sup>6</sup> but though they scraped through Committee in the Lords,<sup>7</sup> Earl Grey thought it prudent to withdraw them when the bill came on for third reading.<sup>8</sup> As agreed to in Committee, these clauses empowered Her Majesty, upon petition of any two colonies to the Governor-General, to create and regulate by Order in Council "The General Assembly of Australia," consisting of the Governor-General and a House of Delegates elected by the legislatures of the petitioning colonies, and such others as should afterwards join, in the proportion of one member to every twenty thousand inhabitants, with a mini-

<sup>1</sup> Hansard, vol. cviii. p. 555.

<sup>2</sup> *Ibid.* vol. cix. p. 1843.

<sup>3</sup> *Ibid.* vol. cxi. p. 1047.

<sup>4</sup> *Ibid.* vol. cx. p. 33.

<sup>5</sup> *Ibid.* vol. cxi. p. 1087.

<sup>6</sup> *Ibid.* vol. cx. p. 806.

<sup>7</sup> *Ibid.* vol. cxi. p. 1227.

<sup>8</sup> *Ibid.* vol. cxii. p. 171.



mum of four for any colony. The General Assembly was to have power to levy and expend customs duties, create a General Supreme Court, and regulate means of communication for the colonies represented in it, and also to legislate for such colonies upon such other matters as they might unanimously agree to submit to it. But, of course, the authority of the Assembly was not to extend to colonies not represented in it, and it was even provided that a colony joining the Assembly might except itself from the operation of the matters expressly confided to the Assembly by the statute.<sup>1</sup>

In the Upper House, the important section fixing the franchise for the Legislative Councils was introduced at the instance of Lord Lyttelton,<sup>2</sup> but his lordship was not equally successful in his attempt to insert a section enabling the colonial legislature to repeal the Land Act of 1842. The debate is also worthy of notice for the suggestion thrown out by Sir William Molesworth, to the effect that colonial representatives might with advantage sit in the House of Commons.<sup>3</sup> The non-appearance of any provision for handing over half the Land fund to the District Councils, as proposed by the report of the Privy Council,<sup>4</sup> was explained by Lord Grey, who pointed out that no statutory authority was necessary to do that which the Treasury was already empowered to do as a matter of administrative detail.<sup>5</sup>

In considering the debate as a whole, we are struck by two obvious reflections. In the first place, it is clear that the apathy which marked the proceedings of 1842 has entirely disappeared. We have seen that the most prominent men in both Houses of Parliament took part in the discussion of the measure. The speech of Lord John Russell showed that he was in earnest about the matter. Earl Grey<sup>6</sup> fought hard for the

<sup>1</sup> Clauses at length in H. L. (Sess. Pa.), 1850, vol. iii. pp. 18-21.

<sup>2</sup> Hansard, vol. cxi. p. 1048.

<sup>3</sup> *Ibid.* vol. viii. p. 1007.

<sup>4</sup> *Ante*, p. 133.

<sup>5</sup> Hansard, vol. cxi. p. 505.

<sup>6</sup> The name of Grey occurs so often and so honourably in the political history of this period, that it is necessary to warn the reader against confusion. The Colonial Secretary of 1850, the father of the Constitution Statute, was Earl Grey, and must not be mistaken for his relative Sir George Grey, who was Home Secretary in the same Cabinet and became Colonial Secretary in 1854, on the division of the offices of War and the Colonies. This Sir George Grey, again, must not be confounded with the Sir George Grey of New Zealand and South African fame, at this time Governor of New Zealand.

bill in the Lords, and perhaps showed true wisdom in refusing to imperil the whole measure by retaining the clauses so narrowly passed in Committee.

The second point to notice is the extreme anxiety shown by parliament to learn the wishes of the colonists, and to accede to them when they were known. There was much dispute as to what these wishes actually were, but the deference intended to them is obvious. The only fact which can be fairly urged against the admission is the refusal of the House of Lords<sup>1</sup> to hear counsel for the opponents of the measure at a late stage. But there can be no doubt that the House was right both in principle and application. The bill was a public bill, dealing with vast general interests. The temper of Parliament was such that any reasonable view of dissent could have found formal expression from the lips of its members. On the other hand, the applicants had no official authority, there was nothing to show that they were anything more than individuals privately interested. To have allowed them to gain special access to the ear of the legislature would have been to sow the seeds of jealousy and future intrigue. Three peers thought it necessary, however, to enter a formal protest against the decision.<sup>2</sup>

The measure itself marks a distinct advance on the legislation of 1842. It creates the new colony of Victoria, and makes provision for its constitutional government and administration of justice. It greatly extends the electoral franchise throughout Australia. It introduces representative institutions into South Australia and Van Diemen's Land, and provides for their extension to Western Australia. It substantially increases the financial powers of the colonial legislatures. It modifies the unsuccessful scheme of local government. It makes plain the way for future constitutional reform in the direction of self-government. And finally, by placing the constitutions of all the Australian colonies on substantially the same footing, it removes one great obstacle from the path of united Australian action.

<sup>1</sup> Hansard, vol. cxi. p. 956.

<sup>2</sup> *Ibid.* p. 1468.

## CHAPTER XVI

### THE INAUGURATION OF THE NEW CONSTITUTION

THE 13 & 14 Vic. c. 59 reached the colony on the 11th January 1851, and was duly proclaimed by the Governor on the 13th following.<sup>1</sup> Thereupon, in accordance with the 37th section, it came into operation, though much remained to be done in order to set it in motion.

The statute was accompanied by a despatch from Earl Grey (dated 30th August 1850), in which the latter explained the views of the Home government.<sup>2</sup> Earl Grey advises that no alteration shall for the present be made in the constitution under the powers of the 32d section. The Governor is not to assent to any bills reducing the salaries of existing officials, or making temporary grants for purposes usually provided for by permanent appropriations. Though the statute is silent as to the destination of the territorial revenue, the Home government has no desire to control its appropriation further than "to ensure its being expended on the objects to which it is legitimately applicable, and in a manner consistent with justice towards those from whom it is raised." Earl Grey also expressly says that the 34th and 35th sections contemplate the founding of a new colony at Moreton Bay, and intimates (what we already know) that the General Assembly clauses have been thrown out in the House of Lords.

Moreover the Secretary of State encloses a copy of a despatch sent by himself to Sir William Denison, the Lieutenant-Governor of Van Diemen's Land, dated 27th July

<sup>1</sup> *Gov. Gazette* (N. S. W.), 1851, 13th January.

<sup>2</sup> Copy in *V. and P.* (N. S. W.), 1851, Sess. i.

1850.<sup>1</sup> This despatch deals more exactly with the appropriation of the Land fund, and directs that it shall be used to supply labour where specially needed, and to provide public works. Where there are local bodies in existence, the actual expenditure should be entrusted, so far as possible, to them, but where there are not the Government should distribute, rather than the colonial legislature, in which the views of the back settlers are apt to be insufficiently represented. These despatches were laid before the Legislative Council of New South Wales when it met to carry out the preliminaries for the new constitution.

The existing Council was convened for this purpose by a Proclamation of the 31st January 1851,<sup>2</sup> which announced the commencement of the session on the 28th March. On the appointed day the Council met,<sup>3</sup> and as an item of interest to Victorians we may note that in this last session William Westgarth took his seat as member for Melbourne, vice Earl Grey.<sup>4</sup>

The Governor's speech requested the Council to work out the preparation for the new constitution, and, as we shall see, the Council accomplished the task. But it was by no means satisfied with the turn of events. On the 8th April Mr. Wentworth moved for a select committee "to prepare a remonstrance against the Act of Parliament 13 & 14 Vic. c. 59" (the Constitution Statute), and the motion was carried, a committee being appointed by ballot.<sup>5</sup> On the 29th April it brought up its report, which contained five separate "protests," embodying what may be regarded as the popular views of the day. These five protests are directed against—

1. The appropriation clauses of the Constitution Statute.
2. The continued reservation of the Land revenue.
3. The control reserved over the Customs.
4. The appointment of government officials by the Home authorities.
5. The provisions for the reservation of bills.<sup>6</sup>

The report was adopted by a vote of 18 to 8, the protests being turned into resolutions of the Council, and ordered to be

<sup>1</sup> Copy in *V. and P.* (N. S. W.), 1851, Sess. i.

<sup>2</sup> *Gov. Gazette* (N. S. W.), 1851, 31st January.

<sup>3</sup> *V. and P.* (N. S. W.), 1851 (Sess. i.), sub date.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* 8th April 1851.

<sup>6</sup> *Ibid.* sub date 29th April.

sent to the Secretary of State and the members of the Privy Council.<sup>1</sup>

Another element of hostility had been introduced by the new member for Melbourne, Mr. Westgarth, who on the 15th April moved that an Address should be presented to the Governor for "all evidence, correspondence, and other documents, explanatory of the principles acted upon in determining the boundary, as at present fixed, between the Sydney and Port Phillip Districts, now to be constituted the Colonies of New South Wales and Victoria respectively." But this motion was lost.<sup>2</sup>

In spite of these evidences of discontent, the Legislative Council performed the task allotted to it. Four of the five statutes of the session provide the necessary machinery for setting the constitution in motion, and three of them specially concern Victoria. The fourth was a new Electoral Act for the mother colony.

The 14 Vic. No. 45 (N. S. W.) provides in effect that all justices of the peace and other officials holding office or commonly resident within the Port Phillip District at the passing of the Act shall continue to act as though the Separation Statute had not been passed, until removed or re-appointed by the Government of Victoria.

The 14 Vic. No. 47 (N. S. W.) is the Victorian Electoral Act. It provides<sup>3</sup> that the Legislative Council of Victoria shall consist of thirty members, ten nominees and twenty elective. The elective members are to represent sixteen electoral districts constituted as follows—

1. Northern division of Bourke County.
2. Southern Bourke County, and Counties Evelyn and Mornington.
3. County Grant.
4. Counties Normanby, Dundas, and Follett.
5. " Villiers and Heytesbury.
6. " Ripon, Hampden, Grenville, and Polwarth.
7. " Talbot, Dalhousie, and Anglesey.
8. Pastoral district of Gipps Land.
9. " " Murray (except that part included in county of Anglesey).
10. " " the Loddon, formerly Western Port (except

<sup>1</sup> *V. and P.* (N. S. W.), 1851 (Sess. i.), p. 81.

<sup>2</sup> *Ibid.* 15th April. (The votes were 18 to 14.)

<sup>3</sup> § 1.

that part included in counties of Dalhousie, Bourke, Anglesey, Evelyn, Mornington, and Talbot).

11. Pastoral district of the Wimmera.
12. City of Melbourne.
13. Town of Geelong.
14. „ Portland.
15. United towns of Belfast and Warrnambool.
16. „ „ Kilmore, Kyneton, and Seymour.<sup>1</sup>

Amongst these constituencies the twenty members are to be distributed thus. Melbourne gets three, Northern Bourke and Geelong two each, and each other electorate one,<sup>2</sup> the areas comprised within the towns having separate representation being excluded from the county franchise.<sup>3</sup> In Melbourne and Geelong the mayors are to be returning officers, in other districts persons appointed by the Governor.<sup>4</sup> Electoral lists are to be formed of persons entitled to vote under the franchise section<sup>5</sup> of the 13 & 14 Vic. c. 59, by Collectors appointed by the mayors in Melbourne and Geelong, and by the chief constables in the other electoral districts,<sup>6</sup> and these lists are to be kept by the town clerks and clerks of petty sessions open for public inspection.<sup>7</sup> Revision Courts are to be held, in each ward of the towns by the alderman and assessors, and in the other electoral districts by the justices of the peace in Petty Sessions,<sup>8</sup> and the revised lists are to be recorded and copies circulated.<sup>9</sup> The writs for the first election are to be issued by the Governor of New South Wales; for subsequent general elections by the governor of Victoria, but for casual vacancies by the Speaker.<sup>10</sup> They are to be directed to the returning officers, who must hold polls, if necessary, on the demand of six electors, at which the voting is to be taken by signed papers.<sup>11</sup> (During the passage of the bill through the Council there had been three petitions from Port Phillip in favour of the ballot, but their suggestions were not adopted.)<sup>12</sup> The names of the successful candidates are to be endorsed on the writs, and returned to the Clerk of the Legislative Council, and by him kept as evidence for five years.<sup>13</sup>

<sup>1</sup> § 2.<sup>2</sup> § 3.<sup>3</sup> § 5.<sup>4</sup> §§ 6 and 7.<sup>5</sup> The 4th.<sup>6</sup> 14 Vic. No. 47, §§ 10-13.<sup>7</sup> § 14.<sup>8</sup> §§ 16-21.<sup>9</sup> §§ 22-24.<sup>10</sup> §§ 25-27.<sup>11</sup> §§ 28-43.<sup>12</sup> *V. and P. (N. S. W.)*, 1851, Sess. I., 11th, 15th, and 29th April.<sup>13</sup> 14 Vic. No. 47, §§ 44, 45. Clerk of which Legislative Council? The

The Act prescribes substantial penalties for bribery, personation, and repetition.<sup>1</sup>

The Council may proceed to business when there are not more than three vacancies by non-return,<sup>2</sup> and disputed returns are to be decided by a committee of seven members nominated (subject to the approval of the Council) by the Speaker at the beginning of each session, as "the Committee of Elections and Qualifications."<sup>3</sup> Cases are to be brought on by petition, signed by a candidate or alleged elector, and presented to the Governor, or (at a bye-election) the Speaker, within four weeks from the return complained of, and referred to the Committee.<sup>4</sup> The Committee is to have large powers of summoning witnesses, inspecting documents, and awarding costs; and it may either declare simply upon the validity of an election, or report a special resolution to the Council.<sup>5</sup> It will be noticed that this provision for the trial of election questions, which was adopted also in the contemporary New South Wales Electoral Act,<sup>6</sup> is a return to the principle of the Grenville Act. It hardly appears to be an improvement upon the plan of 1842.

Finally, the Council passed the 14 Vic. (N. S. W.), No. 49, which provided that all laws and Government or other Public Regulations, especially laws imposing Customs and revenue duties, previously made for the colony of New South Wales, and then in force within the District of Port Phillip, should remain in force, after separation, in the new colony of Victoria, until altered by the Victorian legislature.

Having made these preparations, the old Legislative Council was, on the 2d May, prorogued till the 1st July,<sup>7</sup> and, on the 30th June, dissolved. On the following day, 1st July 1851, the writs for the first election to the Victorian legislature were issued,<sup>8</sup> and thereupon Victoria became a separate colony.

So much for the changes in legislative machinery. We have now to notice the arrangements made by the executive.

But before passing to these, we may turn aside for a moment to note an event which, though not of obvious con-

Victorian Council was not yet in existence, and therefore, presumably, could not have a clerk. <sup>1</sup> §§ 46-51. <sup>2</sup> § 53. <sup>3</sup> §§ 54-57.

<sup>4</sup> §§ 64, 65. <sup>5</sup> §§ 63, 67-72. <sup>6</sup> 14 Vic. (N. S. W.), No. 48, §§ 55-59.

<sup>7</sup> *V. and P.* (N. S. W.), 1851, Sess. i. sub date.

<sup>8</sup> *G. G.* (N. S. W.), 1851, 1st July.

stitutional importance, was practically to change the whole character of Australia, and with it the Victorian Constitution. The existence of precious metals in Australia had long been suspected, and the price of land had risen in consequence. But in the month of May 1851 the discovery of gold at Bathurst placed the matter beyond all question, and sent through the community an electric shock of such force as threatened to paralyse its members. The Governor took a firm stand at once, and by a proclamation of the 22d May 1851<sup>1</sup> claimed for the Crown the exclusive property in all gold, whether found in private or Crown land, and threatened prosecution against all who should attempt to take it without licence. At the same time the proclamation promised speedy regulations for the issue of licences.

The promise was fulfilled on the very next day, when Regulations for Gold Licences, drawn up by the Governor, with the advice of the Executive Council, duly appeared.<sup>2</sup> The details do not fall within our province, for the Regulations were re-issued by the separate government of Victoria upon the discovery of gold within the new colony, and it is doubtful if the New South Wales Regulations were ever deemed to be in force in Victoria.

To return to more immediate topics. At the beginning of June arrived an important despatch containing the arrangements of the executive in contemplation of the ensuing changes. Lord Grey encloses the following documents—

1. Four Royal Commissions under the great seal, appointing Sir Charles Fitz Roy Governor of New South Wales, Van Diemen's Land, South Australia, and Victoria respectively.
2. The Instructions for carrying out each of these Commissions.
3. Royal Commission under the Great Seal, appointing Sir Charles Fitz Roy Governor-General of all Her Majesty's Australian possessions, including the colony of Western Australia.

[The Secretary of State also intended to include a commission to Sir Charles Fitz Roy, under the seal of the High Court of Admiralty, as vice-admiral of the four colonies of New South Wales, Van Diemen's Land, South Australia, and Victoria; but at the last moment it was found that this document was not ready.]

<sup>1</sup> *Gov. Gazette* (N. S. W.), 1851, 22d May.

<sup>2</sup> *Ibid.* 23d May.



4. Three Commissions, under the Royal Sign-Manual, to the respective Lieutenant-Governors of Van Diemen's Land, South Australia, and Victoria.

The explanation of this somewhat embarrassing wealth of documents is given as follows.

Sir Charles is to open immediately his Commissions as Governor of New South Wales and Governor-General, and the former, together with its appropriate Instructions and the Commission as Vice-Admiral of New South Wales, is to be deposited in the archives of that colony. The Commissions as Governor and Vice-Admiral of the other colonies, together with the appropriate Instructions, are to be transmitted to the respective Lieutenant-Governors, to be by them opened and deposited in the archives of their colonies. With these the Governor-General is to transmit the Commissions of the Lieutenant-Governors.

The Commissions as Governor-General and Governor are not to be used to interrupt the ordinary course of administration in the other colonies, which will continue to be perfectly distinct from that of New South Wales, the Lieutenant-Governors corresponding directly with the Colonial Office. But the view of the Secretary of State is, that "the officer administering the government of the oldest and largest of those colonies should be provided with a general authority to superintend the initiation and foster the completion of such measures as those communities may deem calculated to promote their common welfare and prosperity." The Lieutenant-Governors, therefore, will be instructed to communicate on matters affecting common interest with the Governor-General, and to be guided by his judgment. Especially, the Secretary of State desires that no legislation shall be allowed which has for its object the creation of differences between the import duties of New South Wales and Victoria, without mutual communication. And if the Governor-General does deem it necessary to visit either of the three colonies, his authority will unquestionably supersede that of the Lieutenant-Governor for the time being. Earl Grey regards it as unlikely that Sir Charles will have occasion, under any circumstances, to visit Western Australia.<sup>1</sup>

In pursuance of these instructions Sir Charles Fitz Roy took

<sup>1</sup> Copy of despatch in *Gov. Gazette* (N. S. W.), 1851, 7th June.

the oaths of office, and proclaimed himself Governor-General on the 12th June 1851.

Passing now to Victoria itself, we find Mr. La Trobe, on the 15th July 1851, announcing his appointment as Lieutenant-Governor, under the sign-manual, which, in effect, authorised him to exercise the powers contained in the Governor's Commission during the Governor's absence. Mr. La Trobe's proclamation also announced that Her Majesty had appointed the Principal Law Officer, the Treasurer, and the Collector of Customs to be members of the Executive Council of Victoria.<sup>1</sup> As the Lieutenant-Governor was at this time the real head of the Executive in the colony, it may be worth while to see what were his actual directions and powers under the Commission, which, it is believed, has never been printed.<sup>2</sup>

By the terms of this instrument, the Governor is directed to take care that the legislation of the colony conforms to the provisions on the subject in the Constitution Statute, and to appoint an Executive Council of persons nominated by the Crown with the advice of the Privy Council, or provisionally, by himself, which Executive Council is in no case to consist of more than four members. He is empowered to divide the colony into "Districts, Counties, Hundreds, Towns, Townships, and Parishes," to make grants of Crown land with the advice of his Executive Council, and, subject to the provisions of the various statutes and his Instructions on the subject, to appoint judges and judicial officers, to remit fines and penalties up to the amount of £50<sup>3</sup> in each case, to pardon or suspend or mitigate the punishment of offenders, and to suspend from office, in accordance with the terms of his Instructions, any officials he may deem it necessary to remove, until the Crown's pleasure be known. In case of the death or absence of the Governor, all the powers vested in him may be exercised by any Lieutenant-Governor appointed under the sign-manual, or, in the event of there being no such person capable of acting, by the senior member for the time being of the Executive Council.

<sup>1</sup> *Gov. Gazette*, 1851, 23d July. (Apparently there had been a misprint in the earlier issues.)

<sup>2</sup> The originals of these documents are in the Treasury Offices at Melbourne.

<sup>3</sup> This limit was abolished in the governorship of Sir Henry Barkly (Letters-Patent of 2d December 1858, in Treasury offices at Melbourne).

But these formal powers were considerably qualified by the Royal Instructions which accompanied them, and which really formed the practical guide of the Governor's conduct. By these, the Governor is directed to observe certain rules for the prevention of ambiguities in legislation, and to reserve for the royal assent all measures having the following objects:—

1. Infringement of the royal prerogative or the freedom of worship.
2. Pledge of public credit for negotiable instruments, or introduction of paper or token currency.
3. Raising of money by lotteries.
4. Facilitating divorce.
5. Making grant to the Governor, or conferring a private benefit on any person without reserving the rights of others.
6. Interfering with the interests of British subjects not resident in the colony.

He is also directed as to his appointment of an Executive Council, he must (unless specially prevented) preside at all its meetings, and see that accurate records of its proceedings are kept and transmitted to England. If he overrules the opinion of the majority upon any question, he must allow them to enter their reasons at length in the Minute-Book. He must properly carry out, in his alienation of Crown lands, the rules laid down by the Crown Lands Act. In making appointments to the public service, he must, in the first instance, only act temporarily, and await the confirmation of the Home government. When a death sentence is pronounced, he must call a meeting of the Executive Council, and summon the judge who tried the case; but the final responsibility for the confirmation or respite of the sentence must rest with him. Finally, the Governor is to assist in the organisation of the diocese of Melbourne, recently constituted, and to protect and educate the aborigines by all means in his power.<sup>1</sup>

Mr. La Trobe's own Commission (of the same date with that of Sir Charles Fitz Roy) simply appoints him to the office of Lieutenant-Governor of Victoria, with all the "Rights, Privileges, Profits, Perquisites, and advantages to the same belonging," to hold during the pleasure of the Crown; and empowers him, in case of the absence or death of the Governor, to exercise all the powers contained in the latter's Commission, according to present and further Instructions.<sup>2</sup>

<sup>1</sup> Original Instructions in Treasury offices, Melbourne.

<sup>2</sup> The original of this commission is also in the Treasury offices at Melbourne.

To persons unfamiliar with the mysteries of Downing Street, these arrangements may seem needlessly complex.<sup>1</sup> It may indeed well be doubted whether it was wise to attempt to create a general Executive for Australia, in face of the fact that the imperial parliament had definitely declined to create a general legislature, or even to provide for its creation. Suppose that in any difference of opinion between Sir Charles Fitz Roy and Mr. La Trobe, with regard to Victorian affairs, the Legislative Council of Victoria had taken the side of the Lieutenant-Governor against his chief. Both parties would have been placed in an awkward position. But if the legislature had appealed to Sir Charles Fitz Roy against the Lieutenant-Governor, the position of the latter might have been intolerable. It must be remembered that Sir Charles Fitz Roy was not only Governor-General of Australia, but Governor of Victoria, as well as of New South Wales, Van Diemen's Land, and South Australia. Only towards Western Australia did he stand in the position of a mere overlord, and the terms of his Instructions were such that he must have felt that his position with regard to Western Australia was intended to be merely nominal. It was doubtless the fear that the same result would ensue in the other colonies which led the Home government to make the complicated arrangements described in this chapter. But it seems more than likely that these arrangements, if acted upon, would have led to dire confusion, and, as a matter of fact, they never were acted on, at least so far as Victoria was concerned. If it was merely desired to pay a well-merited compliment to a valuable public servant, whose sphere of action was being apparently reduced just as he was deserving well of his country, the object might surely have been attained by the simple grant of the titular distinction of Governor-General to Sir Charles Fitz Roy.

However, the arrangement was continued during Sir Charles Fitz Roy's tenure of office, Sir Charles Hotham's commission, dated the 3d December 1853,<sup>2</sup> being in the same form as that of Mr. La Trobe. But on Sir Charles Fitz Roy's departure,

<sup>1</sup> It is possible that they were suggested by Indian precedents. (Cf. 33 Geo. III. c. 52, §§ 40-46, and 3 & 4 Will. IV. c. 85, §§ 56-59.) And again, the Australian precedent may have reacted on subsequent Indian practice.

<sup>2</sup> Original in Treasury offices at Melbourne.

in January 1855, a new Commission as Governor of Victoria,<sup>1</sup> substantially in the same form as that of Sir Charles Fitz Roy, was issued to Sir Charles Hotham; and though the title of Governor-General was continued till the arrival of Sir John Young in Sydney in the year 1861,<sup>2</sup> we hear very little more about it. It seems to have been of no practical value.

With these preparations, the constitution of Victoria was got to work. But not without a severe trial of stability. For the discovery of gold in New South Wales was speedily followed by its discovery in Victoria, and so great was the shock that the wheels of government were well-nigh stopped. On the 16th July 1851, less than three weeks after separation, the Lieutenant-Governor was obliged to issue a notice to the effect that any public servant who resigned his post in the existing emergency would be noted as ineligible to serve again, and would certainly not be re-appointed during His Excellency's administration.<sup>3</sup> And this ominous notice was followed at the expiration of a month by a proclamation<sup>4</sup> declaring it to be illegal to take gold from any lands in the colony, and to dig or search for gold in the unalienated lands of the Crown. On the 18th August 1851 appeared Regulations for Gold Licences. They are practically identical with those issued by Sir Charles Fitz Roy for New South Wales, and fix the licence fee at thirty shillings a month, payable in advance, the licence to be obtainable from the Commissioner on the spot, who is to make rules adjusting the boundaries of the different claims, to prevent confusion. No one is to be eligible for a licence or renewal unless he produces a certificate of discharge from his last place, or proves to the satisfaction of the commissioner that he has not improperly absented himself from hired service. No licences to dig in private lands are for the present to be granted to any person but the owners or their nominees. The Regulations are followed by the well-known form of licence.<sup>5</sup>

In spite of the severe shock produced by these events, and

<sup>1</sup> Dated 2d Feb. 1855. Original in Treasury offices at Melbourne. The maximum membership of the Executive Council is by this Commission extended to six.

<sup>2</sup> Cf. *Gov. Gazette* (N. S. W.), 1861, 21st Jan., 16th May.

<sup>3</sup> *Gov. Gazette*, 23d July 1851.

<sup>4</sup> 15th Aug. 1851, *Gov. Gazette*. (MS. copy in Public Library, Melbourne.)

<sup>5</sup> Copy of Regulations in *Gov. Gazette*, 20th Aug. 1851. (Specimens of licences actually issued can be seen in the Public Library, Melbourne.)

the evil passions which they aroused, the new Constitution was started. On the 4th October the returns of the elections were published.<sup>1</sup> On the 17th the first meeting of the Council was fixed by proclamation for the 11th November, at St. Patrick's Hall, Bourke Street.<sup>2</sup> On the 31st the appointment of the non-elective members was proclaimed,<sup>3</sup> and on the 11th November the Council duly met.<sup>4</sup>

There were names well known in Australia on the rolls of the first Legislative Council of Victoria. Mr. J. P. Fawcner, one of the pioneers of the colony, sat for the counties of Talbot, Dalhousie, and Anglesey; Mr. J. F. Palmer (afterwards Speaker) for Normanby, Dundas, and Follett; Mr. William Westgarth and Mr. John O'Shanassy for Melbourne City. The nominee members included Mr. (afterwards Sir William) Stawell, the future Chief-Justice; Captain Lonsdale, the first magistrate of Port Phillip; Mr. (afterwards Sir Redmond) Barry; Mr. Ebdon, whose resignation of his seat in the Sydney Council had led to the election of Sir Thomas Mitchell; and Mr. William Clark Haines, the future Colonial Secretary and first Responsible Premier of Victoria. It will be noticed that of the nominee members only two were members of the Executive Council.

Immediately upon the assembling of the legislature the members proceeded to elect a Speaker. The choice fell upon Mr. J. F. Palmer,<sup>5</sup> who, on the following day (12th November 1851), was allowed by the Lieutenant-Governor.<sup>6</sup> On the 13th followed the latter's opening speech,<sup>7</sup> which contained more than one interesting announcement with regard to the future relations between the legislature and the executive. The Lieutenant-Governor stated that he should submit the details of the Government expenditure, even in the unalterable items of the schedule, for the Council's examination, that he should propose a revised tariff after consultation with the other colonies,<sup>8</sup> that he should propose a new system of education and a new judicial system. He asked for an indemnity for the acts of the executive in dealing with the emergencies con-

<sup>1</sup> *Gov. Gazette*, 8th Oct. 1851.

<sup>2</sup> *Ibid.* 22d Oct.

<sup>3</sup> *Ibid.* 5th Nov.

<sup>4</sup> *V. and P.* 1851, p. 1 (this volume is not in the Public Library).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* p. 3.

<sup>7</sup> *Ibid.* p. 10.

<sup>8</sup> This plan was never carried out. The Customs Acts of New South Wales and Victoria for the following year are substantially different (cf. 16 Vic. No. 2 [Victoria], and 16 Vic. No. 7 [N. S. W.])

sequent upon the gold discoveries,<sup>1</sup> and he laid before the Council the papers relative to the proposed financial settlement with New South Wales.<sup>2</sup>

Two more formalities had to be disposed of before the legislature could get fairly to work. Disputed returns required decision, and the Council needed Standing Orders to regulate the details of its business.

There was only one case under the former head. On the 13th November the Lieutenant-Governor laid before the Council a petition which he had received from Geelong, complaining of the return of Mr. Robert Robinson for the constituency on the ground of bribery under the 47th section of the Electoral Act, "For supplying meat and drink to the voters at the said election and keeping open public houses thereat."<sup>3</sup> On the following day the Speaker produced his warrant appointing the Committee of Elections and Qualifications,<sup>4</sup> its members were duly sworn, and on the 20th November the petition was referred to them for decision.<sup>5</sup> On the 11th December their report was brought up and received. After hearing the evidence, the Committee found that the charges had not been proved, but that the petition was not frivolous or vexatious.<sup>6</sup> This finding is practically equivalent to a declaration that "All's fair in war," and is not creditable to the morals of the community at the period. The published evidence proves, either that the bribery was open and unquestioned, or that the witnesses were guilty of unblushing perjury.<sup>7</sup>

On the 12th December the Council adopted a set of Standing Orders, which were duly approved by the Lieutenant-Governor.<sup>8</sup>

<sup>1</sup> Apparently the Council did not comply with this request, but they passed a statute dealing with future cases (15 Vic. No. 15).

<sup>2</sup> Cf. *post*, pp. 163, 164.

<sup>3</sup> *V. and P.* 1851, p. 413.

<sup>4</sup> *Ibid.* sub date.

<sup>5</sup> *Ibid.* sub date.

<sup>6</sup> Report, *ibid.* p. 553.

<sup>7</sup> Evidence in *V. and P.* 1851, pp. 556-564.

<sup>8</sup> *Ibid.* sub date. There is a copy, initialed by the Speaker, in the volume of *Votes and Proceedings* at the Parliament Houses.

## CHAPTER XVII

### TWO FINANCIAL QUESTIONS

Two financial questions were disposed of in the early years of the new Constitution. One related to the exact footing upon which the financial separation between New South Wales and Victoria should be effected, and, though not of first-rate importance, it is worth a passing notice. The other, the transfer of the collection of the Customs duties from imperial to colonial hands, becomes very important in the light of subsequent events.

It will be remembered that on the opening of the first session of the new Legislative Council of Victoria, the Lieutenant-Governor had laid on the table the papers relating to the financial settlement with New South Wales.<sup>1</sup> It will also be remembered that in the course of the agitation for separation, the old Legislative Council at Sydney had passed a resolution to the effect that the revenues from New South Wales proper and Port Phillip should be treated as distinct from the 1st January 1850.<sup>2</sup> The Government of New South Wales was prepared to effect a settlement, upon the stricter basis of a division as from the actual date of Separation, based upon the average contributions of the preceding twelve months.<sup>3</sup> Lieutenant-Governor La Trobe took a third view, and contended that the accounts should be treated as distinct from the 1st of January 1849, on the ground that Separation was practically conceded from that date.<sup>4</sup>

<sup>1</sup> *Ante*, p. 162.

<sup>2</sup> *Ante*, p. 134.

<sup>3</sup> Cf. Minute of Executive Council of N. S. W., 11th March 1852 (copy in *V. and P.* 1853-4, ii. p. 454).

<sup>4</sup> Letter of Mr. La Trobe, 3d May 1851, *ibid.* p. 456. There was no dispute as to the Land funds, which had practically been kept distinct from the resumption of immigration in 1848.



The practical issue between the parties was a sum of £21,165:17:4, and, as there seemed no likelihood of an agreement, the Governor-General decided to refer the question to the Home government for decision, at the same time pointing out that as the Constitution Statute made no express provision on the subject, it might possibly be necessary to obtain fresh legislation.<sup>1</sup> The Secretary of State, being furnished with full accounts,<sup>2</sup> on considering the matter, concurred with the view of the Government of New South Wales, that the legal date of separation was the only date of which official notice could be taken, but for further security referred the matter to the Lords of the Treasury.<sup>3</sup> The latter fully agreed with the Minister, and further had no doubt that the settlement was warranted by inference from the Constitution Statute, without further legislation.<sup>4</sup> Upon this basis, therefore, the settlement was effected, apparently without further remonstrance.

The matter of the Customs, though there was no dispute in connection with it, proved somewhat intricate, and its history well illustrates the complicated machinery of the Imperial executive.

By the English statute 9 & 10 Vic. c. 94, a long series of "Acts to regulate the Trade of the British Possessions Abroad,"<sup>5</sup> passed with the object of securing uniformity in the Customs laws in force throughout the colonial empire, were in effect repealed, permission being given to the colonies to alter and repeal the Customs duties established under those statutes, by colonial Act, assented to by Her Majesty and the Imperial Parliament. The "Acts to regulate the Trade of the British Possessions Abroad" had not in express terms included the Australian colonies, but, as we have seen,<sup>6</sup> they had really been applied to New South Wales; and when it had been desired to give to the latter colony, and others of the Australian group, the power to impose their own Customs duties, this power had been expressly conferred by Imperial legislation.<sup>7</sup> Moreover, in auditing the expenses of<sup>8</sup> and in making appoint-

<sup>1</sup> *V. and P.* 1853-4, ii. p. 454.

<sup>2</sup> *Cf. ibid.* pp. 458-465.

<sup>3</sup> *Ibid.* p. 468.

<sup>4</sup> *Ibid.* p. 469.

<sup>5</sup> *Viz.* the 6 Geo. IV. c. 114; 3 & 4 Will. IV. c. 59; 8 & 9 Vic. c. 93.

<sup>6</sup> *Ante*, p. 30.

<sup>7</sup> *E.g.* 59 Geo. III. c. 114; 3 Geo. IV. c. 96; 9 Geo. IV. c. 83, § 26.

<sup>8</sup> *Cf.* 7 & 8 Vic. c. 82.

ments to the Australian Customs staffs, the Imperial government had followed the practice observed in those colonies to which the "Acts to regulate the Trade of the British Possessions Abroad" did strictly apply.<sup>1</sup>

The statute of 1846 necessitated a change in this practice, and accordingly, by direction of the Treasury in 1847 and following years, the Imperial officers employed under the Board of Customs in Canada had been withdrawn, with the exception of a few who remained to secure the observance of the still subsisting Imperial laws relative to trade and navigation.<sup>2</sup> This change the Home government now proposed to extend to the Customs establishments in the Australian colonies, and on the 8th August 1850 the Secretary of State for the Colonies (Earl Grey) issued a circular to the Governors of the colonies in question, in which he announced that the Home government did not propose to await the coming into force of the new constitutions to effect the contemplated change, but to complete it at once. The effect of the change would be that, with the few exceptions necessary to enforce the Imperial rules relative to trade and navigation, the Customs officials would, for the future, stand on the same footing as the other officials in the colonial service, *i.e.* would be appointed and dismissed provisionally by the Governor, subject to the approval of the Colonial Office, in manner provided by the Colonial Regulations.<sup>3</sup>

But in the course of a few months the Home government seems to have changed its mind with regard to the exact nature of the alterations proposed to be introduced, for on the 19th April 1851 we find Earl Grey writing to the colonial Governors to the effect that it is determined, instead of retaining Imperial officials to secure the enforcement of the Imperial Navigation Laws, to transfer the whole of the Customs establishments to the Colonial Governments, vesting in certain of the colonial officials the powers necessary to enforce the Imperial rules. In return for these powers, the officials in question are to furnish such returns and documents relating to

<sup>1</sup> Treasury Minute of 25th June 1850 (*V. and P.* 1852-3, i. p. 701), and circular of Earl Grey (*ibid.* p. 702).

<sup>2</sup> Cf. Treasury Minute of 25th June 1850 (*ibid.* p. 701).

<sup>3</sup> Circular in *ibid.* p. 701. As to the *Regulations* in question, cf. official copy in Public Library, Melbourne.

trade as may be needed for the information of the Imperial government.<sup>1</sup>

Due notice of the application of this change to Victoria was sent by Earl Grey to Mr. La Trobe. In announcing the event, the Secretary of State for the Colonies especially cautions the Lieutenant-Governor to continue so far as possible in their present positions the existing officials, although they will legally be subject to his power of removal. The Lieutenant-Governor is also directed to consider and report upon the best means of examining and auditing the Customs accounts in the colony.<sup>2</sup>

The next step in the process was a letter sent from the Imperial Commissioners of Customs to the Collector of Customs at Melbourne, in which the latter is informed that "deputations" appointing him and certain others Controllers of Customs and Navigation Laws, together with Instructions for the performance of the new duties, have been forwarded by the Commissioners to the Lords of the Treasury for transmission to the (Lieutenant) Governor of Victoria. Upon receipt of the letter, the Collector is to place himself in communication with the (Lieutenant) Governor, with a view to the transfer, on a date to be fixed by His Excellency, of the establishment of Customs to the Colonial government. From the time of the transfer the Customs accounts will be rendered to the Colonial government.<sup>3</sup>

Upon receipt of this despatch the Collector of Customs at Melbourne wrote a formal letter to the Colonial Secretary, announcing the fact, and requesting the Lieutenant-Governor to name a date for the transfer.<sup>4</sup> Thereupon the Lieutenant-Governor laid all the papers before the Legislative Council,<sup>5</sup> and suggested the 31st December 1852 as the date for completing the process. In this suggestion the Legislative Council immediately concurred,<sup>6</sup> and passed an Act<sup>7</sup> vesting the necessary powers of appointing Customs officials in the Lieutenant-Governor, and making general rules for the regulation of the department. But it would appear that the actual

<sup>1</sup> *V. and P.* 1852-3, i. p. 704.

<sup>2</sup> *Ibid.* p. 699. By the Constitution Statute (13 & 14 Vic. c. 59, § 15) the Imperial government reserved the power to give directions on this point.

<sup>3</sup> *Ibid.* p. 700.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* 11th August.

<sup>6</sup> *Ibid.* 26th August.

<sup>7</sup> 16 Vic. No. 23.

re-organisation was not effected till the appointment of Mr. Childers in 1854, and even then the old title of "Collector" was retained, though the Collector undertook the Imperial duties of "Comptroller of Customs and Navigation Laws."<sup>1</sup> The inevitable effect of the change would be to consolidate the colonial executive, and thus prepare the way for Responsible Government.

<sup>1</sup> *V. and P.* 1855-6 (Papers), ii. p. 51.

## CHAPTER XVIII

### LOCAL GOVERNMENT

It now becomes necessary to examine the progress made in the development of local government under the Constitution of 1850.

By the Constitution Statute itself it is provided that all District Councils created under the constitution of 1842, to which no elections have ever taken place, shall be treated as null, and that even in cases where elections have taken place, the Governor may, upon the petition of the Council itself or of the inhabitant householders of the District, revoke the patent of constitution. The way thus being cleared of former wrecks, the Governor is to have power, upon the petition, duly proclaimed, of the inhabitant householders of any division not included in an existing District Council, to incorporate such inhabitants in manner and for the purposes provided by the statute of 1842.<sup>1</sup> In nearly all respects the provisions and powers contained with respect to the subject in the statute of 1842 are to apply to the Districts thus created, but the important and unpopular provision of that statute which provides for the payment of half the police expenses of the colony by assessment levied upon the Districts, is unequivocally repealed.<sup>2</sup> It is also provided that, in spite of any powers of local government existing by virtue of either statute, the colonial legislature may regulate the exercise of their powers by the local bodies, as well as alter their constitution and powers and the limits of the districts themselves.<sup>3</sup>

Practically, then, the new Constitution made the future formation of local government areas optional on the part

<sup>1</sup> 13 & 14 Vic. c. 59, § 20.

<sup>2</sup> *Ibid.* § 23.

<sup>3</sup> *Ibid.* § 24.

of their inhabitants, and removed the most objectionable feature of the old system, the heavy charge for the police rate.

In the second session of the new legislature the matter was taken up, and a select committee appointed to consider the whole subject of district councils.<sup>1</sup> On the 15th September a report was presented.<sup>2</sup> The committee find that the failure of the scheme of 1842 is due mainly to the great areas of the districts, and to the provisions as to the police rate. They recommend that for the future areas of local government shall not have a radius of more than twenty-five miles, that the duties of the local bodies shall be confined to the execution and maintenance of public works, that to this end the suggestion of the Privy Council with regard to the distribution of the territorial revenue shall be adopted, and that the outstanding liabilities of the Districts of Bourke and Grant shall be defrayed out of the general revenue.<sup>3</sup>

Of these suggestions the most substantial for general purposes are certainly those which recommend a reduction of the area of the districts and the scope of the local government functions. But the report of the committee loses a good deal of its value when it appears that the evidence upon which it is framed is very scanty, and obviously biassed.<sup>4</sup> Only two witnesses were examined, and they were both led. The report must be taken merely as an expression of the *a priori* views of the Committee, and it was not adopted by the Council.<sup>5</sup>

For there was a rival scheme in the field. On the 7th July 1852 the Lieutenant-Governor had laid before the legislature a return showing the amount expended on roads and bridges by the government during the year 1851,<sup>6</sup> and on the same day with the appointment of the District Councils Committee (which was only carried by 12 votes to 5) another committee had been appointed without opposition to consider the subject of roads and bridges.<sup>7</sup> On the 3d November this Committee presented a very interesting report, in which they sketched the previous history of road-making in the parent

<sup>1</sup> *V. and P.* 1852-3, 14th July.

<sup>2</sup> *Ibid.* sub date.

<sup>3</sup> *Ibid.* ii. p. 373.

<sup>4</sup> *Ibid.* pp. 377-381.

<sup>5</sup> *Ibid.* 1852-3, 1st December 1852.

<sup>6</sup> *Ibid.* sub date.

<sup>7</sup> *Ibid.* 1852-3, 14th July.

colony of New South Wales. Before 1824<sup>1</sup> all the roads had been made by Government as part of its ordinary duty, and tolls for maintenance had been levied under prerogative claim. This practice was recognised and continued after the constitution of the Legislative Council by the 6 Geo. IV. No. 20 (N. S. W.),<sup>2</sup> continued by the 2 Will. IV. No. 12 (N. S. W.), and the policy thus inaugurated was extended, and great additional powers given to the Surveyor-General, by the 4 Will. IV. No. 11 (N. S. W.), which also empowered the governor to appoint "Commissioners of Roads," charged to inspect and report. But it is expressly provided by this Act that these developments shall not interfere with "the right of the Crown to make or repair public or private Roads."<sup>3</sup> A schedule to this Act shows that at the date of its passing (1833) there were only thirteen public roads in the whole colony.

A great step in the process of development was taken in the year 1840, when the Legislative Council of New South Wales passed an Act,<sup>4</sup> providing for the election of trustees of parish roads by the proprietors of land situated within three miles of and usually approached by any parish road. The trustees so elected may hold office for three years, and may levy a rate for the purpose of making or maintaining parish roads. They may also appoint surveyors, endowed with powers similar to those granted to the Surveyor-General by the 4 Will. IV. No. 11, and the Governor is empowered to proclaim tolls on the roads and to assign the proceeds to the trustees.

Apparently some progress had been made under this last enactment, for in the year 1850 we find an Act<sup>5</sup> giving extended powers of letting the road tolls to farm. It should be remembered also that the corporations of Melbourne and Geelong had considerable powers in the matter of road-making.

Accordingly the committee recommend a further development of the existing policy, by the creation of an elective Central Road Board, charged with the duty of maintaining the main roads and bridges, and a provision for the creation of

<sup>1</sup> *I.e.* the date of the creation of the first Legislative Council under 4 Geo. IV. c. 96 (*ante*, p. 12).

<sup>2</sup> This Act based itself upon the Imperial Statute, 59 Geo. III. c. 114, but the latter enactment really only refers to import duties.

<sup>3</sup> 4 Will. IV. No. 11 (N. S. W.), § 33.

<sup>4</sup> 4 Vic. No. 12 (N. S. W.)

<sup>5</sup> 14 Vic. No. 5 (N. S. W.)

District Road Boards, in districts proclaimed by the Governor, with charge of the parish and cross roads. The Central Road Board is to have the disposal of all the government grants for roads, and is to be assisted by an executive of an inspector-general and staff. The chairmen of the District Boards, when these are established, are to have seats, but not votes, on the Central Board.<sup>1</sup>

The valuable report of the committee formed the basis of the 16 Vic. No. 40—the “Act for making and improving Roads in the Colony of Victoria.” But in one important particular the Act differed from the views of the committee. The Central Road Board created by the Act was a nominee body of three members, appointed during pleasure by the Lieutenant-Governor.<sup>2</sup> The Central Road Board is to have the powers and officials suggested by the report,<sup>3</sup> and local Road Districts are to be formed in the manner proposed by the same document, except that the initiation is vested in rather a larger class of persons.<sup>4</sup> Until the District Boards are formed, the trustees of parish roads elected under the 4 Vic. No. 12 (N. S. W.) are to act as District Boards for three miles on either side of their parish roads.<sup>5</sup> But though the District Boards, when created, are to have power to levy tolls, the fixing of the rate is to be left, within the bounds prescribed by the Act, to a meeting of landholders and householders.<sup>6</sup> The occupier of land is to be primarily liable for the rate, but may deduct one-half from his rent.<sup>7</sup> All the funds collected by the District Boards are to be paid into the Colonial Treasury, but are to be issuable upon warrants signed by the chairmen and one member each of the respective Boards which collected them.<sup>8</sup> The District Boards are to be capable of suing and being sued in the names of their members, but the liability for corporate debts is to be confined to corporate property.<sup>9</sup>

This was a thoroughly statesmanlike attempt to deal with the question, and it succeeded admirably. Up to the 31st December 1855, less than two years from its creation, the Central Road Board had completed 152 miles of main road, and done a good deal of other work at a time when labour was

<sup>1</sup> See report in *V. and P.* 1852-3, ii. pp. 504-8.

<sup>2</sup> 16 Vic. No. 40.

<sup>4</sup> §§ 6 and 7.

<sup>6</sup> § 27.

<sup>7</sup> § 30.

<sup>8</sup> § 56.

<sup>2</sup> 16 Vic. No. 40, § 2.

<sup>5</sup> § 11.

<sup>9</sup> § 59.



singularly hard to get and very difficult to organise.<sup>1</sup> The scheme of District Boards gradually developed, till it glided naturally into the policy of the "Shires Statute" of 1869,<sup>2</sup> which again led the way to the consolidating Local Government Act of 1874. But it is doubtful if the credit of the policy can rightly be claimed by Victorian statesmen, for there can be little hesitation in attributing the main outlines at least of the scheme to similar legislation which had taken place a short time before in South Australia and Van Diemen's Land.<sup>3</sup>

But another great step in the development of local government was taken in this period. In the year 1854 general measures upon the subject were proposed by the Government, which obviously wished to attempt some fulfilment of the intentions of the Constitution Statute. Although former efforts to introduce a complete scheme of local government into the country districts had not been successful, the town corporations of Melbourne and Geelong had for some time been in existence with good results, and quite recently the municipal franchise had been greatly extended.<sup>4</sup>

The result of the Government proposals was the "Act for the Establishment of Municipal Corporations,"<sup>5</sup> which empowered the incorporation of any area not exceeding 9 square miles, and having a population of at least 300, upon the petition of 150 resident householders, not opposed by a greater number,<sup>6</sup> and authorised the Governor, with the consent of the municipality, subsequently to include within it any adjoining district with a density of population of 36 resident householders to the square mile.<sup>7</sup>

The governing body of the municipality is to be a Council, consisting of three, five, or seven members, with a chairman annually elected, and made, *ex officio*, a justice of the peace.<sup>8</sup> The members of Council retire by rotation, but are re-eligible.<sup>9</sup>

The powers given to the municipal Council are considerable. It has the power of making by-laws for the "general good government" of the district.<sup>10</sup> It is to manage the roads, piers, and wharves, and to provide and manage public cemeteries, to care for the poor and infirm, to provide a water supply, and to

<sup>1</sup> *V. and P.* 1852-3, ii. p. 511.

<sup>2</sup> 33 Vic. No. 358.

<sup>3</sup> Cf. Ordinance, 1849, No. 14 (S. A.) and 15 Vic. No. 8 (Van Diemen's Land).

<sup>4</sup> By the 16 Vic. No. 18, reducing the qualification by one-half.

<sup>5</sup> 18 Vic. No. 15.

<sup>6</sup> § 2.

<sup>7</sup> § 3.

<sup>8</sup> §§ 10-17.

<sup>9</sup> § 18.

<sup>10</sup> § 26:

make rules for drainage and lighting arrangements.<sup>1</sup> It may levy tolls and dues upon the roads, wharves, and other public conveniences within its district, and a general rate on houses and land not exceeding two shillings in the pound on the annual value, half of such rate to be paid by the landlord and half by the tenant.<sup>2</sup> All by-laws, rates, and assessments are to be approved of by the Lieutenant-Governor before coming into operation,<sup>3</sup> and the Government is to have the right of inspecting the progress of all works undertaken with borrowed money.<sup>4</sup> If a Council, after receiving a loan of public monies, fails to comply with its engagements, and the ratepayers decline to elect a new Council, the Governor may transfer its functions to a board of commissioners, to be exercised until the loan is repaid.<sup>5</sup>

This Act may be regarded as the parent of town self-government in Victoria, just as the 16 Vic. No. 40 was the parent of rural self-government. The area fixed by it as the maximum for a municipality still remains the orthodox limit for a borough, and many of the provisions of the Act are continued in the most recent legislation on the subject. The Act was popular, and immediately put into force.<sup>6</sup> The period before us is therefore important, amongst other things, as being the seed plot of the system of local government in Victoria.

<sup>1</sup> §§ 27, 28.

<sup>2</sup> § 30.

<sup>3</sup> § 33.

<sup>4</sup> § 28.

<sup>5</sup> § 50.

<sup>6</sup> Cf. petitions for incorporation in *G. G.* 1855, 27th February, etc.

## CHAPTER XIX

### THE ADMINISTRATION OF JUSTICE

THE arrangements contemplated by the constitution of 1850 for the establishment by Letters-Patent of a Supreme Court of Victoria were never carried out, for things moved quickly in those days, and within a short time after the establishment of the new colony the matter was made the subject of a colonial statute. The 15 Vic. No. 10, many of the provisions whereof are still in force,<sup>1</sup> provides that there shall be a court to be styled "the Supreme Court of the Colony of Victoria,"<sup>2</sup> consisting of not more than three judges, of whom one is to be styled "the Chief-Justice of the Supreme Court of the Colony of Victoria," and is to take precedence of every person in the colony except the Governor and Lieutenant-Governor and certain very exalted Imperial personages.<sup>3</sup> The judges of the court are to be appointed temporarily by the Lieutenant-Governor, and permanently by Her Majesty, with similar provisions for their suspension.<sup>4</sup> The court is also to be furnished with a Master in Equity, Registrar, Prothonotary, and other necessary officials, appointed in the same manner as the judges, but holding office during pleasure only.<sup>5</sup>

The court is to be a Court of Record,<sup>6</sup> and to have within Victoria the common law jurisdiction of the three superior courts of common law at Westminster; the criminal jurisdiction of the Court of Queen's Bench and the Central Criminal Court in London; the equitable, common law, and domiciliary jurisdiction of the Lord High Chancellor of England; and ecclesiastical jurisdiction, including the power to grant and

<sup>1</sup> They have, of course, been re-enacted by the "Supreme Court Act 1890."

<sup>2</sup> 15 Vic. No. 10, § 2.      <sup>3</sup> §§ 3, 4.      <sup>4</sup> §§ 3, 5.      <sup>5</sup> § 7.      <sup>6</sup> § 9.

effect probate and administration according to the practice of the Prerogative Court of Canterbury.<sup>1</sup> Every criminal prosecution in the court is to be by information in the name of a law officer of the colony, but a private person may obtain leave to file an information in any matter not involving the punishment of death.<sup>2</sup> All issues of fact on criminal trials are to be tried by juries of twelve.<sup>3</sup>

Besides the Supreme Court, there are to be Circuit Courts proclaimed by the Lieutenant-Governor throughout the colony, with the powers to hear civil issues and try criminal offences committed within the circuit districts of the courts of *Nisi Prius*, Assize, Oyer and Terminer, and General Gaol Delivery in England; <sup>4</sup> and in the matter of civil issues the Circuit Courts are to stand in the same relation to the Supreme Court as the courts of *Nisi Prius* occupy towards the superior courts from which their records are sent, but no judge of the Supreme Court will require a special commission to hold a Circuit Court.<sup>5</sup>

There is also to be a sheriff for the colony, with deputies for the circuit districts, to act as the executive officers of the court, with power to sell the real and personal property of execution debtors and to grant replevin as in England.<sup>6</sup> An important provision enables the Supreme Court to change the "venue"<sup>7</sup> in any proceedings in the interests of justice.<sup>8</sup> The Court may also, subject to certain restrictions, make rules of practice for the conduct of business and the education and admission of practitioners.<sup>9</sup>

So far as Australian authority is concerned, the decision of the Supreme Court is in every matter to be final; but in any case involving one thousand pounds the party aggrieved may obtain leave to appeal to Her Majesty in Council, upon giving within three months the security ordered by the court.<sup>10</sup> This provision is, however, to be subject to Her Majesty's own

<sup>1</sup> § 15.<sup>2</sup> §§ 12, 13.<sup>3</sup> § 12. The Supreme Court Act was founded upon a report drawn up by Mr. Stawell and Mr. Barry in the first session of the Legislative Council (*V. and P.* 1851-2, p. 239).<sup>4</sup> For meaning of these terms cf. Blackstone, *Commentaries*, bk. iv. c. 19.<sup>5</sup> 15 Vic. No. 10, § 17.<sup>6</sup> §§ 21-25.<sup>7</sup> *I.e.* the place of trial, which formerly, in certain cases, depended upon the place where the offence was alleged to have been committed.<sup>8</sup> § 31.<sup>9</sup> § 32.<sup>10</sup> §§ 33, 34.

Regulations upon the subject of appeals,<sup>1</sup> and, by an Order in Council, the amount necessary to constitute a good ground of appeal was in fact reduced to five hundred pounds.<sup>2</sup>

The Act was immediately got to work, and two judges appointed under it. These were Mr. (afterwards Sir William) à Beckett, the former District Judge of Port Phillip, who was appointed Chief-Justice, and Mr. (afterwards Sir Redmond) Barry, who was at the time Solicitor-General and a nominee member of the Legislative Council.<sup>3</sup> In accordance with English practice, Mr. Barry, on his appointment as judge, resigned his seat in the Legislative Council.<sup>4</sup>

But the increasing needs of the colony required a great development of legal machinery, and in the next session we find several very important Acts dealing with the various departments of legal administration. The intricacies and pitfalls of criminal practice were remedied by the 16 Vic. No. 7, the law of evidence by the 16 Vic. No. 9, the subject of Courts of Sessions was dealt with by the 16 Vic. No. 3, the old system of Courts of Requests was superseded by that of County Courts by the 16 Vic. No. 11, the jury laws were extended by the 16 Vic. No. 7, and various reforms effected on the police system by various enactments.<sup>5</sup>

<sup>1</sup> § 35.

<sup>2</sup> Order of 9th June 1890, under 7 & 8 Vic. c. 69 (copy of Order in Government edition of *Consolidated Statutes*, under Supreme Court Act 1890).

<sup>3</sup> *G. G.* 1852, 21st January.

<sup>4</sup> *V. and P.* 1852-3, 2d July.

<sup>5</sup> 16 Vic. Nos. 13, 14, 16, 24.

## CHAPTER XX

### THE LAND QUESTION

ALTHOUGH the Land question occupied a good deal of attention in this period, there is not very much of a historical nature in connection with it, for the action of the Council was directed rather more towards the operation of the existing system in individual cases than towards the system as a whole. Towards the end of the period, however, important steps were taken.

Very full statistics upon the subject of the Crown lands were laid before the Legislative Council by the Lieutenant-Governor during the session of 1852. From them it is possible to gather not merely the legal, but to some extent the economic position of the question. The total amount of Crown lands, just over 600 square miles, which had been alienated before Separation, had produced a total result of £776,000 (odd). The fluctuation of prices had at different times been singularly capricious, but the general result was that during the latter years of the period town lands had shown a decided tendency to fall in value, while the suburban and country lands showed an equally steady tendency to rise. Till the year 1845, the average price of country lands in any year never exceeded the statutory minimum of £1 an acre, but in the year 1850-1 (before the discovery of gold) it rose to £1 : 5s. an acre. The purchase by private contract of lands unsold at auction seems to have been very popular, this method accounting for nearly one-half of the total sales. The auctions generally took place at Melbourne, Portland being the only other place at which they were held.

One very interesting item in the statistics is the return showing the extent to which the squatters had availed them-

selves of the power of pre-emption granted by the Order in Council of 9th March 1847.<sup>1</sup> Only 1783 acres had actually been granted, to five claimants, under the Order, but within the last twelve months no less than seventy other applications to purchase had been received, and were only delayed by the inability of the Survey department to make the necessary investigations. This return is a striking comment on the report of Mr. Lowe's committee of 1849, which described the pre-emptive right as worthless.<sup>2</sup>

The discovery of gold in the winter of 1851 had, of course, enormously increased the amount of the land sales during the ensuing twelve months, the country lands going up in quantity from 33,000 to 128,000 acres. But it is a little remarkable that the average price of country land had scarcely increased at all; such increase in price as there was went to the account of town lands. Altogether, in the year ending 30th June 1852, the Land fund realised from sales alone no less a sum than £327,000. The applications for purchase by pre-emptive right were still pouring in, and the powers of the Survey department were taxed to the utmost to secure suitable reserves for the future use of the public. It had, however, succeeded in reserving over 1000 square miles in the Intermediate and Unsettled districts of the colony from the claims of the squatters.<sup>3</sup>

But the difficulties and dangers of the first year of gold produced other effects on the Land question. So great had been the excitement in the colony, that the Government had only been able to retain the services of its officials, at a time when they were imperatively needed, by the offer of greatly increased salaries. And not only had the salaries of the existing officials been increased, but very large extensions of the staff had to be made. In these circumstances both the Governor-General and the Lieutenant-Governor suggested to the Home authorities that the large funds being derived from the issue of gold licences should be definitely appropriated to meet the increased expenses of the Colonial government, and that they should be invested with power even to employ the unap-

<sup>1</sup> *Ante*, p. 103.

<sup>2</sup> *Ante*, p. 104.

<sup>3</sup> These figures are taken from papers in *V. and P.*, 1852-3, ii. pp. 1-84. As to the difficulty between the squatters and the reserves, cf. *post*, pp. 182-188.

propriated moiety of the remaining Land revenue for similar exigencies.

The answer to these suggestions came in the very important despatch of Sir John Pakington (Earl Grey's successor) dated 2d June 1852, which was laid before the Legislative Council of Victoria on 7th September 1852.<sup>1</sup> The income from the gold licences is granted freely and unreservedly, and the distribution of this fund is placed in the hands of the Legislative Council,<sup>2</sup> who will thenceforward take over the management of the gold question.<sup>3</sup> With regard to the unappropriated moiety of the residue, the permission is by no means so wide, though the concessions are great. The Lieutenant-Governor is authorised to apply the fund generally, with the advice of the *Executive* Council, "to the purposes rendered urgent by the present crisis, so far as this can be done without absolute inconvenience to other departments of the public service."<sup>4</sup> The urgent need for immigrants at present existing in the colony of course rendered it impossible to entertain the cession of that part of the Land fund appropriated for emigration purposes, and the demand of Geelong to be admitted to share in the distribution amongst the municipal councils contemplated by the constitution of 1850 met with a rather cool reception from the Home government.<sup>5</sup>

This despatch marks another important step in the development of the Land question. Not only is a substantial part of the territorial revenue absolutely handed over to the colonial legislature, but the colonial executive is empowered to draw upon half the remainder at its discretion.<sup>6</sup> Nominally, of course, the executive still remained independent of the legislature, but the progress of events was strengthening the latter, and the result of the concession soon became obvious. On the 9th December 1853 the Legislative Council passed a resolution that "the exigencies of this colony are so great, that the unappropriated moiety of the Land Fund is necessary for the general wants of the Colony," and embodied the resolution in an Address to the

<sup>1</sup> *V. and P.* sub date. Despatch in *V. and P.*, 1852-3, i. pp. 720-723.

<sup>2</sup> Par. 16 of despatch.

<sup>3</sup> Par. 19.

<sup>4</sup> Par. 23.

<sup>5</sup> *V. and P.*, 7th Feb. 1853. Despatch in vol. i. p. 928.

<sup>6</sup> For the year 1852 the gold revenue handed over reached nearly half a million (*V. and P.*, 1853-4, i. p. 832).



Lieutenant-Governor.<sup>1</sup> The following day the latter replied that if the funds already provided failed to meet the requisite expenditure, he should hold himself bound to make up the deficiency, so far as might be, from the balance of the unappropriated moiety of the land fund; but that "if the object of the Council in its present Address be to induce the Lieutenant-Governor to pledge himself to an unconditional transfer of the unappropriated moiety of the Land Fund to the General Revenue, to be placed on the Ways and Means—the Lieutenant-Governor must state his regret that a compliance with the wish of the Council is, at this time, quite out of his power."<sup>2</sup> In other words, the fund may be relied upon as an ultimate resort, but is not to be treated as part of the ordinary revenue.

Upon this footing matters continued during the period, the Government constantly supplying the deficiencies in the ordinary revenue by drafts from the Land fund.<sup>3</sup>

On the 7th February 1853 there came an important announcement from the Home government, to the effect that the colonial officials would no longer be allowed to exercise the right reserved to the Crown by the 15th section of the Land Act of 1842,<sup>4</sup> of selling unsurveyed blocks exceeding 20,000 acres by private contract at the minimum upset price then prevailing.<sup>5</sup> This section, the parent of the great Land companies of New South Wales and Van Diemen's Land, had been made use of by a private capitalist in Victoria, and it was evident that, in the new circumstances, the practice tended to encourage a dangerous monopoly. The credit of the official initiative in the matter is apparently due to Lieutenant-Governor La Trobe.

We now come to the very important and acute development of the question which took place during the latter portion of the period under review, and which practically carried the subject up to the grant of Responsible Government. This time it is not a question between the colony and the Home government, but a division amongst the colonists themselves.

The Order in Council of 9th March 1847<sup>6</sup> practically contemplated the substitution for the annual licence system, in

<sup>1</sup> *V. and P.*, sub date.

<sup>2</sup> *V. and P.*, 10th December 1852.

<sup>3</sup> Cf. accounts for 1852, 1853, and 1854 in volumes of *V. and P.* for the succeeding years.

<sup>5</sup> Despatch in *V. and P.*, 1852-3, p. 928.

<sup>4</sup> 5 & 6 Vic. c. 36.  
<sup>6</sup> *Ante*, p. 103.

the Intermediate and Unsettled districts, of a leasehold squatting system, based upon the grant of leases not exceeding eight and fourteen years respectively. It also contemplated the pre-emptive purchase by the squatters of portions of their runs, to secure their homesteads and permanent improvements.

But it will be remembered that the licence system had been purely personal, being, in fact, mere permission to certain individuals to depasture flocks within certain roughly-defined districts. But a lease has, almost from time immemorial, signified in English law a grant for a term of years of a definite and carefully identified piece of land. While, therefore, it was quite possible to give a squatter a personal licence to pasture stock in a country never before trodden by the foot of white man, a country whose local details were absolutely unknown to the Government, it was not logical to grant the same person a lease of a similarly vague character. It became necessary to make a survey of the land proposed to be granted, and to settle boundaries between rival claimants.

It is barely possible that this necessity altogether escaped the attention of the framers of the Order in Council of 9th March 1847. It is more likely that their ignorance of local conditions led them to assume that the task of survey would prove comparatively light. Probably they were not intimately familiar with the local features of South Gippsland and Port-land Bay District.

Be this as it may, it is quite certain that the necessity for survey practically postponed to an indefinite date the granting of the leases in Port Phillip. When Separation came, very little headway had been made in the task; and, in spite of the Government Regulations which from time to time appeared on the subject, the squatters were practically, to all appearance, in the same position that they occupied before the passing of the 9 & 10 Vic. c. 104.<sup>1</sup> Possibly they considered themselves safe; possibly they were indifferent to the prospects of being ejected.

But the discovery of gold at once changed the aspect of affairs. Its first effect was to stop the slow process of survey by calling off the survey parties to more exciting pursuits.

<sup>1</sup> Despatch of Lieutenant-Governor La Trobe, dated 3d September 1852 (*V. and P.*, 1853-4, ii. p. 244).

Its second was to establish a mutually helpful and profitable trade in supplies between the squatters and the thousands of improvident gold-seekers, who rushed to the front without a thought of provisions. Its third effect, closely connected with the second, was to excite in the minds of the squatters a lively anticipation of future profit to be realised by holding on to that popular commodity, land. And the fourth was to arouse in the minds of the newer arrivals, the gold-seekers and those connected with them, a strong desire to break up for sale the undeveloped lands of the colony.

Hereupon arose much difficulty. Naturally enough, the squatters began to look with unbounded respect upon that charter of their hopes, the Order in Council of 9th March 1847, and its amendments. Into these documents they naturally read all that their feelings dictated, and, in the expressive language of old equity principle, they "treated that as done which ought to have been done." Briefly put, their claim was, that having applied for leases, and their demand having been thwarted only by the dilatoriness of the government, they must be deemed to be leaseholders in actual possession under the Orders in Council, with pre-emptive rights to purchase the fee-simple of any parts of their runs at non-competitive rates.<sup>1</sup> And they strenuously opposed the throwing open to public sale of any portion of the lands they occupied.

Considerable agitation was the result of this conflict of views, and after much petitioning and resolving<sup>2</sup> the matter came before the Legislative Council. On the 28th July 1852 Mr. Fawcner moved a resolution advocating the inclusion of the whole of the "Intermediate" districts proclaimed under the 9 & 10 Vic. c. 104, together with such parts of the "Unsettled" districts as included known goldfields, within the "Settled" area.<sup>3</sup> As the effect of this prayer, if acceded to, would have been greatly to reduce the area of pastoral leases, and practically to annihilate the most valuable pre-emptive claims of the squatters, the motion was strongly opposed by the pastoral interests in the Council, with the result that an inconsistent amendment was carried by a majority of 18 to 7 votes.<sup>4</sup> The amendment suggested that leases should be

<sup>1</sup> *V. and P.*, 1853-4, ii. p. 248.

<sup>2</sup> Documents, *ibid.* pp. 276-285.

<sup>3</sup> For meaning of these terms cf. *ante*, p. 113. <sup>4</sup> *V. and P.*, 1852-3, 28th July.

immediately issued to the occupants of Crown lands, to date from the 7th February 1848,<sup>1</sup> in order that the lands might be "opened for sale under the Orders in Council of the 9th March 1847 in quantities to meet the demand of the increasing population of the colony."<sup>2</sup>

Three weeks later, however, the Legislative Council seems to have agreed upon a compromise between the contending parties, for when, on the 17th August 1852, it was moved by Mr. Fawcner that the Lieutenant-Governor should be requested to withhold grants of land to all persons claiming under the pre-emptive rights alleged to have been conferred by the Orders in Council, the motion was amended by a clause exempting the grants of land for homesteads, and then agreed to, apparently without a division.<sup>3</sup>

The policy of the Government at this juncture is concisely stated by the Lieutenant-Governor himself, in his report of the matter to the Home government. He declined to interfere with the preparations for the issue of leases which were still proceeding, and he allowed the applicants for leases to purchase, under the pre-emptive claim, limited portions of their runs for homestead purposes. But he made a very liberal use of the powers of reservation contained in the Orders in Council by withdrawing from the pastoral areas large reserves, not merely for public purposes usually so understood, but also for township and village sites; and these reserves, although situate beyond the settled districts, he threw open to public sale in allotments for the benefit of settlers. At the same time he promised to bring the whole matter at once before the Home government.<sup>4</sup>

This promise the Lieutenant-Governor amply redeemed by his long and careful despatch of the 7th September 1852,<sup>5</sup> from which we learn so much of the history of the question. The Lieutenant-Governor had to justify himself to his chief for two breaches of routine which were said by some persons to be breaches of law. He had made use of the powers of reserva-

<sup>1</sup> The date originally fixed for the first application for new runs under the Order in Council. (Cf. *G. G. (N. S. W.)*, 1848, 5th January.)

<sup>2</sup> *V. and P.*, 28th July 1852.

<sup>3</sup> *Ibid.* 17th August 1852.

<sup>4</sup> See reply of Lieutenant-Governor to address of Legislative Council, in *V. and P.*, 1852-3, i. p. 131.

<sup>5</sup> Copy in *V. and P.*, 1853-4, ii. pp. 241-304.

tion for public purposes contained in the third section of the Land Act of 1842,<sup>1</sup> and the Order in Council of 9th March 1847, to withhold from the squatters large tracts of land which they claimed to be entitled to purchase under pre-emptive right; and secondly, he had put up these reserves for sale to the general public, under the power contained in the order in council to "grant" reserves for public purposes, although it had hitherto been the practice only to sell lands within the settled districts.

But the breaches of law were only apparent. The Land Act of 1842 was a restraining, not an enabling statute. It put an end to the power of the Crown to dispose of lands otherwise than by public auction, except in certain instances which, in spite of the general words of section 3, clearly do not cover the case of Mr. La Trobe's village reserves. But the Act was directed not against open sale but against free grant or private contract, and the Lieutenant-Governor had not adopted either of these methods. The Act, by implication, left the Crown perfectly free to sell *any* lands by public auction, at the statutory upset price. It was true that Government had not been in the habit of selling lands beyond the settled districts, but that was a matter of practice only.

The Order in Council is more difficult to dispose of. The eighth section of Chapter II certainly empowers the Government to reserve from the *sales* to occupants under pre-emptive claims any land required for the purposes enumerated in the third section of the Land Act. And the following section of the order authorises him to make *grants or sales* of lands comprised within leases actually granted to occupants, for a very comprehensive list of public purposes, including mining of all descriptions, "or for any other purpose of public defence, safety, utility, convenience, or enjoyment, or for otherwise facilitating the improvement or settlement of the colony." But it is doubtful if a construction of these words in a court of justice would have warranted a withdrawal of lands actually comprised in a lease for the purpose of starting a new township. As a matter of fact, the law officers of New South Wales were divided in opinion when the question was put to them,<sup>2</sup> while those of Victoria itself were clear that the practice could not

<sup>1</sup> 5 & 6 Vic. c. 36.

<sup>2</sup> *V. and P.*, 1853-4, ii. p. 261.

be legally justified.<sup>1</sup> However, this was not the whole case. The squatters seemed to have overlooked the fact that the whole tenor of the Order in Council was, as regarded the Colonial government, permissive and not mandatory. The Governor was *empowered* to grant leases for periods not exceeding certain fixed limits. The squatters treated this permission as a direction to grant leases in all cases for the full periods allowed by the Order. Moreover, they assumed all through that such leases had actually been granted, although as a matter of fact they had not.

Having stated the facts, the Lieutenant-Governor proceeds to make three suggestions for the future settlement of the question. He considers it of the first importance that, with due care to secure homestead allotments to the squatters, the Government shall be entitled to throw open for sale any of the land in the unsettled districts. Secondly, he suggests that the issue of such leases as it may be deemed desirable to grant shall be immediately proceeded with, even at the risk of some uncertainty in the description of boundaries. And thirdly, that for the valuation system applied to the runs, there shall be substituted a fixed capitation rent on the sworn returns of stock.

On the 14th March 1854 the reply of the Secretary of State was laid before the Legislative Council.<sup>2</sup> It is no wonder that the Duke of Newcastle (who had succeeded Sir John Pakington) shrank in rather an obvious way from the formidable difficulties of his task, hinting very plainly that if the Colonial Office had desired to shirk its duties, there was a certain loophole of escape in the fact that the approaching changes in the constitution would turn the whole question over to the hands of the Colonial government.

But the Secretary of State will struggle with the difficulties, and his view is, briefly, that if the squatters are disposed to insist upon the extremest view of their rights under the Order in Council, regardless of the public interest, they shall have justice, more than they desire. The length of the lease-terms, within the limits fixed by the Order, being left entirely to the Government, the latter will exercise its unfettered discretion as to those terms. It is true that, during the continuance of

<sup>1</sup> *V. and P.*, 1853-4, ii. p. 255.

<sup>2</sup> *Ibid.* sub date.

the leases, no lands in the unsettled districts can be sold to outsiders, but neither is the Government bound (only empowered) to sell to the occupants. Further, the Government shall construe very liberally, in the public interest, the powers of reservation and sale contained in the order. And, if necessary, a special Order in Council will be forwarded, enabling the Lieutenant-Governor to extend the limits of the settled and intermediate districts, and thus to do away *pro tanto* with the claim for leases.

But if the squatters will be reasonable, and accept leases with proper restrictions in the public interest, and moderate provisions for the exercise of their pre-emptive claims, the Lieutenant-Governor is empowered to grant such leases, even up to the maximum terms sanctioned by the Order in Council, without waiting for the conclusion of the survey. And if there are any who would prefer to surrender their extreme claims for compensation, the Home government will be ready to sanction any measures recommending an appropriation for that purpose of the public funds of the colony, or of lands in other neighbourhoods.<sup>1</sup>

A not very important Order in Council, partly carrying out the views of the Secretary of State, was made on the 18th April 1854,<sup>2</sup> and laid before the Legislative Council of Victoria on the 21st February 1855.<sup>3</sup> But the remaining great event in the history of the question during this period was the appointment, on the 2d November 1854, of a Royal Commission to inquire into the whole subject of the occupation of Crown lands in the colony, including both the existing rules on the subject and the claims made against the Government in respect of alleged disappointments.<sup>4</sup> The Commission consisted of eleven persons, most of them well-known names, and their report was presented on the 8th June 1855.<sup>5</sup> Unhappily, the members disagreed considerably in their conclusions.

The main report, which was signed by every member of the Commission save one, though seven entered protests on different points, found as a fact that during the agitation which

<sup>1</sup> Copy of despatch in *V. and P.*, 1853-4, ii. p. 693.

<sup>2</sup> *Ibid.* 1854-5, iii. p. 243.

<sup>4</sup> Copy commission in *Ibid.* iii. p. 293.

<sup>3</sup> *Ibid.* sub date.

<sup>5</sup> *Ibid.* sub date.

preceded the passing of the 9 & 10 Vic. c. 104, the squatters never claimed protection against the *bona-fide* auction purchaser, but only against arbitrary ejectment by the Government.<sup>1</sup> It also held that the assent of the Government to the applications for leases must be held to be proved, as a fact, by its long silence in the matter; but it adopted the view that, as a matter of law, the Government was not bound to grant the leases for the maximum terms allowed by the Order in Council.<sup>2</sup>

Its practical recommendations are as follows—

1. Continuous survey and sale of Crown lands, with a view to the requirements of all classes of purchasers, so as to prevent the (average) price rising much above the existing legal minimum.
2. Granting of annual licences to existing occupants for pastoral purposes only.
3. Fixing of an uniform rent under such licences according to the grazing capabilities of the run, with minimum assessment of 1d. per acre.
4. Abandonment of the existing territorial classification.<sup>3</sup>

The extreme views of the squatters were represented by Mr. Forlonge, who declined altogether to sign the report, and charged its framers with being the mouthpiece of an unscrupulous anti-squatting party, and the report itself with being "subtle, insidious, and one-sided."<sup>4</sup> The extreme views on the other side found expression in the protest signed by Messrs. O'Shanassy, Fawkner, and Nicholson, who, in effect, proposed to rack rent the runs.<sup>5</sup> More moderate expressions of dissent from the actual recommendations of the report were recorded by the Speaker (Mr. J. F. Palmer) and Mr. Charles Bradshaw, who held the view that the squatters were equitably entitled to compensation, and suggested that it should take the form of eight-year leases in the unsettled districts, subject to an unrestricted right of sale by the Crown without notice or compensation.<sup>6</sup>

This report practically ends the history of the matter for the period, for on the 23d November 1855, at the assembling of the Legislative Council for its last session under the existing constitution, the Governor laid before it the Imperial statute

<sup>1</sup> Report in *V. and P.*, 1854-5, iii. at p. 300.

<sup>2</sup> *Ibid.* pp. 306-9.

<sup>4</sup> *Ibid.* p. 329.

<sup>5</sup> *Ibid.* p. 326.

<sup>3</sup> *Ibid.* p. 313.

<sup>6</sup> *Ibid.* pp. 315-9.



18 & 19 Vic. c. 56, repealing the Land Act of 1842, and the matter was thus left to the discretion of Responsible Government.<sup>1</sup>

But in order that we may obtain a just idea of the magnitude of the subject, we may glance at a report presented to the Legislative Council on the 18th March 1856,<sup>2</sup> in pursuance of a resolution carried at the instance of Mr. Fawcner on the 8th June 1855.<sup>3</sup> The report<sup>4</sup> shows that at the close of the year 1855 there were upwards of a thousand different runs in the grazing districts of the colony, that upon these upwards of five million head of sheep and nearly half a million head of cattle were being fed, and that the territorial income of the Government from the licence fees of these stations amounted to upwards of £60,000 a year, irrespective of the amount paid into the general revenue as the assessment on stock.

At the same time, it is clear that the existence of squatting runs did not prohibit the process of sale. During the last half of the year 1855, 177,000 acres were disposed of by auction sale, realising a price of £326,000. Under pre-emptive rights 32,000 acres had been purchased, at a price of £34,000. Country lands continued to rise in value, the average price per acre during this period being £1 : 9 : 11.<sup>5</sup>

<sup>1</sup> *V. and P.*, sub date.

<sup>2</sup> *Ibid.* sub date.

<sup>3</sup> *Ibid.* sub date.

<sup>4</sup> *Ibid.* 1855-6, ii. pp. 817-883.

<sup>5</sup> Report in *ibid.* pp. 515-526.

## CHAPTER XXI

### THE NEW CONSTITUTION

DURING the period under notice several changes were made in the details of the Constitution. At the beginning of the year 1854 the Lieutenant-Governor introduced the Elective Franchise Bill, expressing his action as being under the provisions of the 5 & 6 Vic. c. 76.<sup>1</sup> The Bill passed through the Council without much discussion, and ultimately became law as the 17 Vic. No. 32. It extends the electoral franchise to every subject of the Crown who, in consideration of payment, is entitled to occupy or mine on any waste lands of the Crown within the colony for a period of twelve months, and who has actually so occupied or mined for a period of three months before registration, the disqualifications of the Constitution as to crime and non-payment of rates and taxes being continued. This Act was presented to the governor for consent along with the new Constitution Bill, and was by him reserved for the royal approval.<sup>2</sup> Owing to a technical difficulty,<sup>3</sup> the royal assent was not received for upwards of twelve months, but on the 21st May 1855 it was duly proclaimed.<sup>4</sup>

Twice also during the period the numbers of the Legislative Council were increased. On the first occasion, in the year 1853, twenty-four seats, eight nominee and sixteen elective, were added, bringing the total membership to fifty-four. Of the sixteen new elective seats, nine were added to the existing county constituencies, and seven were given to the towns, Melbourne obtaining three new members.<sup>5</sup> On the

<sup>1</sup> *V. and P.*, 27th Jan. 1854. This must be a mistake for 13 & 14 Vic. c. 59.

<sup>2</sup> *Ibid.* 28th March 1854.

<sup>3</sup> *Ibid.* 1854-55, ii. p. 419.

<sup>4</sup> *G. G.*, 22d May 1855.

<sup>5</sup> 16 Vic. No. 29.

second occasion, in 1855, twelve new members were admitted. Of these the elected eight were distributed amongst the new electoral districts of Castlemaine, Sandhurst, Ballaarat, Avoca, and Ovens, all of these districts, with the exception of the last, being apparently divided into parishes. Some of the older districts were rearranged to provide for the new constituencies.<sup>1</sup> Apparently it was not considered necessary to reserve either of these Acts for the royal assent. The numbers of the Legislative Council thus reached sixty-six.

But these changes were, after all, mere matters of detail compared with the fundamental proposals then being discussed for the adoption of Responsible Government, to which we must now turn our attention.

It seems undoubtedly true, though very curious, that, so far as Victoria is concerned, the first official step in the process was taken by the Home government, not by the Colonial legislature. In fact, in the session of 1852-3 Mr. Fawkner had moved for a committee to inquire into the Constitution Act of 1850, with a view to suggesting amendments, and the proposal had been met by a flat negative.<sup>2</sup> But, on the opening of the following session, the Lieutenant-Governor laid before the Council a despatch from Sir John Pakington, enclosing a copy of another despatch to Sir Charles Fitz Roy, and "offering to the colony of Victoria the same concession on the same terms."<sup>3</sup>

It appears from other sources that the protest adopted by the old Legislative Council at Sydney immediately upon the receipt of the constitution of 1850<sup>4</sup> had not received much sympathy from the Home government; but when, after the discovery of gold and the consequent inrush of population, the protest was renewed by the new Council, it had borne substantial fruit.<sup>5</sup> Earl Grey's successor, Sir John Pakington, sent an answer which was practically a concession of all disputed points.<sup>6</sup> The Secretary of State cannot admit the right of the colony to the Land fund, but he will grant it on grounds of

<sup>1</sup> 18 Vic. No. 34.

<sup>2</sup> *Ibid.* 1853-54, ii. p. 385.

<sup>3</sup> *V. and P.*, 9th July 1852.

<sup>4</sup> *Ante*, p. 151.

<sup>5</sup> Committee appointed 31st Oct. 1851. Report 27th Nov. 1851 (cf. *V. and P.*, N. S. W., sub dates) and copy report in *ibid.* vol. ii. p. 643. Adopted 5th Dec. 1851 (*V. and P.*, sub date). And cf. statements of Mr. Adderley in (Imperial) Hansard (3d series), cxxxviii. p. 1974.

<sup>6</sup> Copy in *V. and P.*, 1853-4, ii. p. 387.

expediency. The restrictions on the alteration of the Civil List, though of a trifling character, will be withdrawn. Transportation, even to Van Diemen's Land, will be wholly discontinued.<sup>1</sup> Sir John Pakington points out that, owing to the recent changes in the Customs administration,<sup>2</sup> the complaints of the remonstrance on that head have ceased to have any force. Curiously enough, that which seems to us the very marrow of the whole matter, the change to the system of Responsible Ministers, is hardly touched upon. The Secretary of State repudiates the charge that the Crown patronage has been unfairly exercised, and suggests that any contemplated Constitution Bill shall contain a Civil List (variable by the Colonial legislature) providing for the claims of political officials. But he practically accedes to the demand for a constitution resembling that of Canada, based upon a double-chamber legislature, and suggests that the Legislative Council shall at once proceed to frame it. This last point is noteworthy. Hitherto the Australian colonies have been governed by constitutions made in England; henceforth the initiative is to come from them.

Almost immediately after this important despatch had been written, Lord Derby's Cabinet, of which Sir John Pakington was a member, fell from office, and was replaced by a coalition Ministry under Lord Aberdeen. The Duke of Newcastle succeeded to the seals of the Colonial Office, and he hastened to confirm the promises of his predecessor.<sup>3</sup> It only remained therefore for the Victorian legislature to take full advantage of the invitation of the Imperial government.

This it was by no means loath to do. Two days after the receipt of the despatches, a strong committee of twelve members, chosen by ballot, was appointed to consider and report upon the best form of constitution for the colony.<sup>4</sup> On the 9th December 1853 this committee brought up its report, together with a draft bill,<sup>5</sup> which was read a first time on the 15th.<sup>6</sup> The discussion of its details will come at a later stage, but it will be necessary to sketch here the outlines of the scheme, in order that we may trace its progress to its final stage.

Fortunately the means of doing so are easy of access, for

<sup>1</sup> This had been the subject of considerable excitement in New South Wales and Victoria.

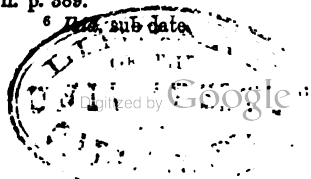
<sup>2</sup> *Ante*, pp. 164-167.

<sup>3</sup> Despatch of 18th Jan. 1853, in *V. and P.*, 1853-4, ii. p. 389.

<sup>4</sup> *V. and P.*, 1st Sept. 1853.

<sup>5</sup> *Ibid.* sub date.

<sup>6</sup> *Ibid.* sub date.



the committee, in its report, stated the principles of the measure in a series of resolutions, preparatory to the introduction of the bill.

These resolutions in effect proposed a Constitution consisting of two legislative chambers, both elective, and a Governor, the members of the upper chamber (the "Legislative Council") being elected on a high freehold qualification, both for electors and members, sitting for ten years without re-election, and retiring by rotation; the members of the lower house also requiring a freehold qualification for themselves, but being elected practically upon a £10 leasehold or occupation, and a £5 freehold franchise, or a franchise derived from an income of £100 a year.<sup>1</sup> The lower house (the "Legislative Assembly") is to sit for three years, unless sooner dissolved by the Governor, and is to meet at least once a year.<sup>2</sup> The Legislative Assembly is to have the sole origination of all money bills, the Council being entitled to refuse or return, but not to amend them.<sup>3</sup> The proposal of every appropriation is to come from the Government and to "rest" with the Assembly.<sup>4</sup> The Governor is only to have power to reserve a bill if it affect certain specified Imperial interests,<sup>5</sup> and any difference of opinion on the subject is to be settled by the Judicial Committee of the Privy Council.<sup>6</sup> Her Majesty may, through the Secretary of State, send to the Governor any directions as to the exercise of the power of revocation, but may not fetter his discretion in relation to bills of local or municipal concernment.<sup>7</sup> The Civil List is to contain provision for the salaries of the Governor, the judges, and other judicial officers holding *dum bene*; of the Responsible officers of government and the officials of the Legislative and Executive Councils; for the pensions of the officials holding *dum bene* and the Responsible Ministers; for compensation to those who will become liable to removal by the change of constitution;<sup>8</sup> and for the maintenance of public worship.<sup>9</sup> No person who holds a "place of profit" (*i.e.* under the Crown), or government contractor, except the Ministers of the day, is to be entitled to sit in either House of the legislature.<sup>10</sup> The "Responsible Officers"

<sup>1</sup> Resolutions 1-36 (*V. and P.*, 1853-4, iii. 593).

<sup>2</sup> Res. 26-38.

<sup>3</sup> Res. 42.

<sup>4</sup> Res. 43.

<sup>5</sup> Res. 46, 48.

<sup>6</sup> Res. 49.

<sup>7</sup> Res. 50.

<sup>8</sup> Res. 51.

<sup>9</sup> Res. 68.

<sup>10</sup> Res. 52-54.

are to consist of eight officials named,<sup>1</sup> and the Executive Council is to be composed of at least four of them, and of not more than three non-official members.<sup>2</sup> Two at least of the responsible officers must hold seats in each house of legislature.<sup>3</sup> All the patronage of the government is to vest in the Governor.<sup>4</sup> An "absolute majority of two-thirds of the members of both Houses" is to have power to alter the constitution, the bill being reserved, however, for the royal assent.<sup>5</sup>

It seems far too rash to say, as is sometimes said, that these resolutions were simply copied from recent legislation affecting the Canadas.<sup>6</sup> Doubtless, in accordance with Sir John Pakington's suggestion, the members of the committee studied the Canadian statutes. They had, in the course of the proceedings, assented to a proposal to name the Houses of legislature the "Senate" and "House of Representatives," after the American model,<sup>7</sup> and doubtless the change which was afterwards made was made with reference to the Canadian practice. But the Canadian Council was nominee, not elective; the House of Assembly was quadrennial, not triennial; the Canadian statutes were framed upon very special financial arrangements with the Crown; they practically provided a dual administration; there is no trace in them of the project of "Responsible Government"; and the franchise clauses are wholly different from those of the Resolutions.

On the 25th January 1854 the bill was read a second time and referred to a committee of the whole house.<sup>8</sup> Considering its importance, it does not seem to have provoked much discussion in its progress through this body. By a large majority the committee decided to embody the details of the electoral districts, for the Assembly as well as for the Council, in the bill itself, instead of leaving them to subsequent legisla-

<sup>1</sup> Res. 55. These are—the Chief Secretary (formerly "Colonial Secretary"), the Attorney-General, the Treasurer (formerly the "Colonial Treasurer"), the Commissioner of Trades and Customs (formerly the "Collector of Customs"), the Commissioner of Crown Lands and Survey (formerly the "Surveyor-General"), the Postmaster-General, the Solicitor-General, the Commissioner of Public Works.

<sup>2</sup> Res. 56.

<sup>3</sup> Res. 57.

<sup>4</sup> Res. 58. This resolution, if carried out, would have been fatal to the security of "Responsible Government."

<sup>5</sup> Res. 70.

<sup>6</sup> 3 & 4 Vic. c. 35 and 10 & 11 Vic. c. 71.

<sup>7</sup> *V. and P.*, 1853-4, iii. p. 599. This amendment was afterwards rescinded (p. 620).

<sup>8</sup> *Ibid.* sub data.

tion.<sup>1</sup> With equal decision, it determined to retain the disqualification attaching to ministers of religion as candidates for the Assembly, which had been inserted in the draft bill.<sup>2</sup> Mr. Greeves made an effort to have the Council elected by the Assembly, but without success.<sup>3</sup> Nearly half the committee were in favour of increasing the length of the tenure of a seat in the Assembly.<sup>4</sup> Curiously enough, on the vital matter of the appointment to public offices, the committee were equally divided in opinion as to whether the patronage should be vested in the Governor alone, or in the Governor and the Executive Council, and the latter view was only carried by the casting vote of the chairman.<sup>5</sup> Over the question of the religious establishment there was considerable discussion, but the principle of subsidising religious bodies was passed by a majority of nearly three to one,<sup>6</sup> a clause limiting the grants to bodies professing the Christian faith being carried by a much smaller majority.<sup>7</sup>

On the 2d March 1854 the bill was ready for report,<sup>8</sup> and was presented to the House, but on the 14th it was committed for reconsideration; and this process was repeated on several occasions,<sup>9</sup> until, on the 24th March, it was read a third time, and formally passed.<sup>10</sup> On the 28th March the Governor announced that he reserved the measure for the royal assent.<sup>11</sup>

The fact that the bill, though it did not finally leave the Victorian legislature till the end of March, reached England on the 31st May, is evidence of the great improvement in means of communication which had taken place in the past few years. But quick as the passage was, it was not sufficiently quick to enable the bill to be laid during the pending

<sup>1</sup> *V. and P.*, 1853-4, i. p. 504. The committee had originally proposed to divide the colony into counties and ridings as the basis of electoral division (Resolutions 27-30). But the proposal fell through.

<sup>2</sup> § 14. The disqualification had originally been rejected by the committee (*V. and P.*, 1853-4, iii. p. 610).

<sup>3</sup> *V. and P.*, 1853-4, i. p. 510.

<sup>4</sup> *Ibid.* p. 519.

<sup>5</sup> *Ibid.* p. 521. Of course the executive councillors themselves would have to be appointed by the Governor alone. The proper suggestion had originally been made by the Auditor-General, but defeated by the Speaker (vol. iii. p. 606).

<sup>6</sup> *Ibid.* vol. i. p. 522.

<sup>7</sup> *Ibid.* p. 523.

<sup>8</sup> *Ibid.* sub date.

<sup>9</sup> *Ibid.* March 21, 22.

<sup>10</sup> *Ibid.* sub date.

<sup>11</sup> *Ibid.*

session before the Imperial Parliament, which usually finds its hands fairly full at the end of May. The fact was duly announced by the Secretary of State to the Governor, with the information that a similar fate had befallen the New South Wales bill.<sup>1</sup> The Victorian Council was, naturally, disappointed, and on the 14th November 1854 adopted a strong Address urging the immediate passing of the Act, and especially deprecating any attempt to make all the Australian constitutions alike.<sup>2</sup>

Soon after the adoption of this Address the subject was considered by the Imperial Parliament. It was introduced by Lord John Russell (who had accepted his old office of Colonial Secretary on the retirement of Mr. Sidney Herbert from the Palmerston government) in the form of a request for leave to bring in a bill "to enable Her Majesty to assent to a Bill, as amended, of the Legislature of Victoria, 'to establish a constitution in and for the colony of Victoria.'"<sup>3</sup>

The scheme of the Government was vehemently criticised by Mr. Robert Lowe, formerly an active member of the Legislative Council at Sydney, who had by this time returned to England and been elected to sit in the House of Commons as member for Kidderminster. Mr. Lowe pointed out that the Minister would neither assent to nor refuse the measure proposed by the Victorian legislature, nor would he take upon himself the straightforward task of devising a constitution for the colony. But, while admitting that the bill passed by the colonial legislature was *ultra vires*, as attempting to deal with matters strictly within the province of the Imperial Parliament, he proposed to amend it, without consulting the colonists themselves, and then to ask Parliament to sanction Her Majesty's assent to a measure which would represent the views neither of the Imperial nor the colonial legislatures.<sup>4</sup> Lord John Russell replied that in the course he proposed he was actuated mainly by a wish to save time, and to gratify the known wish of the colonists for a speedy settlement of the question, a desire which could not be gratified if the measure were sent back for reconsideration.<sup>5</sup> Mr. Lowe did not press

<sup>1</sup> *V. and P.*, 1854, iii. p. 21.

<sup>2</sup> *Ibid.* sub date.

<sup>3</sup> (Imperial) Hansard (3d series), cxxxviii. p. 379.

<sup>4</sup> Hansard, cxxxviii. pp. 379-382.

<sup>5</sup> *Ibid.* pp. 382-384.



his opposition, and the measure was introduced and read a first time.<sup>1</sup>

On this occasion the subject of Australian government did not arouse in England anything like the interest which it had awakened in 1850, although when the Victorian bill came on for second reading, it excited some little opposition. The names of the speakers were not those of the first order, and one of them, at least, complained of the scanty attendance in the House.

The actual course taken by the opponents of the measure was to propose the postponement of the discussion for an indefinite period. This step was proposed by Mr. Bell and seconded by Mr. Miall, the well-known champion of Nonconformity, both of whom rested their opposition upon the provision made by the colonial bill for religious endowments. They were supported by Mr. Lowe, who, however, did not confine himself to their grounds of objection, but urged also the peculiar process of assent proposed by the Government, the extravagance of the Civil List sanctioned by the bill, its aggressive character in dealing with Imperial matters, and the manifestations of dislike which it had evoked in the colony. The opposition was also supported by Mr. Adderley, who suggested that Instructions should be sent to the Governor enabling him to assent on the spot to such a measure as the colonial legislature might, after final deliberation, agree to; and Mr. Gavan Duffy, though he declined to vote for Mr. Bell's amendment, announced his intention of proposing an important alteration in the qualification clauses for membership of the legislature when the bill came into committee.

But the Government was too strong for its opponents. Sir John Pakington supported his predecessor, though opposed to him in general politics, and Lord John Russell crushed Mr. Adderley's proposal by pointing out that if Her Majesty had had power to send the Instructions suggested by him, she would not have needed to apply to Parliament in the present instance; and that, as regarded the form of the measure, he had followed the precedent of recent Canadian legislation.<sup>2</sup> Finally, Mr.

<sup>1</sup> Hansard, cxxxviii. p. 384. The clauses which Lord John Russell had struck out were those standing as §§ 37-43 in the bill sent home (cf. Victorian statutes, 17 Victoria). They related to the exercise of the prerogative, and should be carefully studied.

<sup>2</sup> 10 & 11 Vic. c. 79.

Bell withdrew his amendment, and the bill was read a second time without a division.<sup>1</sup>

In committee, the opposition to the bill practically centred itself on three points. Mr. Adderley moved the rejection of the clause retaining the provisions of former statutes on the subject of the royal veto. He explained that he did not wish to interfere with the power of the Governor to assent to, refuse, or reserve bills, but he objected to the power of the Home government to annul bills which had received the Governor's assent, and he desired to leave full discretion to the latter. Mr. Adderley was, however, opposed by Mr. Scott, the agent for New South Wales, and, as the Government was also against him, his amendment was lost by seventy-two votes.<sup>2</sup>

Mr. Miall then proposed to omit so much of the fourth section of the bill as enacted that the restraining provisions of the colonial statute in respect of alterations in certain parts of the constitution should remain in force until formally repealed by the colonial legislature.<sup>3</sup> This section was really unnecessary, but Mr. Miall hoped to turn it into a clause prohibiting the enforcement of the restraining provisions which the colonists themselves had passed, hoping the more easily to get rid of his aversion, the religious grants. Sir John Pakington, on the other hand, objected to the section as destroying the very safeguards which the colonial Act set up. But both objections were overruled.<sup>4</sup> A little fighting over the Civil List, in which no successes were gained by the opposition, concluded the work in committee,<sup>5</sup> the bill was reported without amendment, and read a third time without debate.<sup>6</sup> In the House of Lords the only sign of interest was a moderate speech by Lord Mounteagle, who deprecated the manner in which the Government had seen fit to give effect to the wishes of the colonists.<sup>7</sup> The bill received the royal assent on the 16th July 1855.<sup>8</sup>

<sup>1</sup> Report of debate in Hansard, cxxxviii. pp. 1956-1989.

<sup>2</sup> Hansard, cxxxix. p. 87.

<sup>3</sup> The 60th section of the colonial Act as finally passed. It requires that the second and third readings of bills to alter the constitution of Parliament or the grants in schedule D (Civil List) shall be passed by absolute majorities of both Houses, and reserved for the royal assent. It will be observed that these provisions may be altered by Act in the usual way.

<sup>4</sup> Hansard, cxxxix. pp. 90-95.

<sup>6</sup> *Ibid.* p. 297.

<sup>7</sup> *Ibid.* p. 653.

<sup>5</sup> *Ibid.* p. 100.

<sup>8</sup> *Ibid.* p. 873.

Meanwhile the bill to repeal the Crown Land Acts had been passing through Parliament, and, in fact, received the royal assent on the same day.<sup>1</sup> It will be remembered that one of the most important terms of the new arrangement had been that the control of the Land fund should be surrendered to the colonial legislature, in return for which the latter would vote a liberal Civil List. In fact, by the terms of the colonial Act, the coming into force of the new constitution had been held contingent on the repeal of the 5 & 6 Vic. c. 36, and the 9 & 10 Vic. c. 104.<sup>2</sup> Although it is doubtful whether the colonial legislature was within its powers in enacting this provision, there can be no question that it would have been a gross breach of faith on the part of the Imperial Parliament to sever the two subjects.

The Waste Lands Repeal Bill was brought in by Lord John Russell in company with the New South Wales Constitution Bill, and on that occasion discussion was confined almost entirely to the latter measure.<sup>3</sup> Neither did the bill provoke any comment on other occasions, passing through all its stages without discussion.<sup>4</sup> It applied to all the Australian colonies, but in Victoria it was not to take effect till the proclamation of the Constitution Statute,<sup>5</sup> and the powers of the repealed statutes with regard to the application of funds received in England from the colonial Land revenues were expressly reserved from the repeal.<sup>6</sup> The legislature of any colony in respect whereof the 5 & 6 Vic. c. 36 is repealed may repeal the Orders in Council made under it, subject only to existing engagements;<sup>7</sup> but until otherwise provided, the existing Land Regulations are to be deemed in force in the four colonies about to obtain Responsible Government.<sup>8</sup> All past appropriations are placed beyond the scope of inquiry.<sup>9</sup>

These enactments, and the assent of Her Majesty in pursuance of the Constitution Statute,<sup>10</sup> which was given on the 21st July 1855, completed the scheme of the framers of the

<sup>1</sup> Hansard, cxxxix. p. 873.

<sup>2</sup> 18 & 19 Vic. c. 55, Sched. (1), § 63.

<sup>3</sup> Hansard, cxxxviii. pp. 719-736.

<sup>4</sup> *Ibid.* p. 1948, cxxxix. pp. 297, 363, 645, 849, 873.

<sup>5</sup> 18 & 19 Vic. c. 56, § 2.

<sup>6</sup> § 3.

<sup>7</sup> § 4.

<sup>8</sup> § 6. *I.e.* New South Wales, Victoria, Van Diemen's Land, and South Australia.

<sup>9</sup> § 8.

<sup>10</sup> Copy in *V. and P.*, 1855-6, ii. p. 562.

Victorian measure. In forwarding the statute, Lord John Russell explained the reasons which had led him to make slight amendments in the colonial Act, instead of re-enacting the whole constitution by Imperial legislation. The clauses which attempted to control the relations between the Crown and the Governor have simply been omitted, but the Secretary of State takes the opportunity of explaining that the Instructions to the Governors on the subject of their assent to colonial measures are uniform throughout the Empire; and, though binding on the Governors, are in no way in the nature of conditions precedent to the validity of colonial legislation. They can be set aside at any time by the Crown, and, as between the latter and the colony, the Governor's action is the action of the Crown.<sup>1</sup>

Lord John Russell also states, that while Her Majesty's government recognise the liberality of the provision made for the Civil List, they have no wish to prevent its alteration in the future by the colonial legislature, and the Governor's instructions will only direct him to withhold the royal assent in the case of alterations in the emoluments of existing officials.

Finally, the Imperial government have had under their serious consideration the question of introducing into the constitution clauses leading up to a federal union, but they have decided that the present is not a time to bring forward such measures, although they will be ready to give the best attention to proposals in that direction emanating from the colonies themselves.

It is somewhat significant of the confusion created in official circles in England by the Crimean War, that no less than three changes occurred in the tenure of the seals of the Colonial Office during the progress of these measures through Parliament, and that the despatch enclosing Her Majesty's assent to the Constitution Act, though only one day later than that covering the Imperial statute, was signed by a different Secretary of State for the Colonies.<sup>2</sup> In the year 1854, on the outbreak of the war, the old union between the War and Colonial Offices, which had existed since 1800, was severed,

<sup>1</sup> Copy of despatch in *V. and P.*, 1854-5, ii. p. 529. This rule has since been made statutory by the 28 & 29 Vic. c. 63, § 4.

<sup>2</sup> Sir William Molesworth, *V. and P.*, 1854-5, ii. p. 562.

Sir George Grey receiving the seals of the Colonies, and the Duke of Newcastle taking the War department. On the resignation of Lord John Russell's ministry, in January 1855, Sir George Grey had been succeeded by Mr. Sidney Herbert; but when the latter deserted Lord Palmerston in the same year, Lord John Russell came to the rescue, only to resign again over the Vienna negotiations, and to be replaced by Sir William Molesworth.

But there had been one other enactment during the session of 1854-5 which seriously, though indirectly, affected the interests of Victoria. Simultaneously with the Victorian Constitution Statute and the Waste Lands Repeal Act there had passed the New South Wales Constitution Statute. Ever since the year 1842, the boundary between Port Phillip District and New South Wales proper had been recognised as lying along the course of the Murray from the boundary of South Australia to its source, and thence by a straight line to Cape How. The words of the Act of 1842 are explicit. "Provided also, that for the Purposes of this Act the Boundary of the District of *Port Phillip* on the North and North-east shall be a straight Line drawn from *Cape How* to the nearest source of the river *Murray*, and thence the Course of that River to the Eastern Boundary of the Province of South Australia."<sup>1</sup> This boundary, which was far less favourable to Victoria than that drawn by the Land Regulations of 5th December 1840, had been maintained ever since the Act of 1842, and had been repeated in the Constitution of 1850.<sup>2</sup>

No alteration was made in the boundary thus appointed by the new Victorian Constitution Statute, nor by the colonial enactment contained in its schedule. On the contrary, the Colonial Office expunged from the bill sent home a section (the 51st) which would have enabled the Crown, with the *consent* of two adjoining colonies, to alter the boundaries. The power reserved to the Crown, by the Act of 1850,<sup>3</sup> of altering the dividing line upon petition of the legislature of either colony, therefore remained, being unaffected by the repealing clauses of the statute of 1855,<sup>4</sup> but there is no trace of it having been exercised. And the Constitution Act framed by the Legislative

<sup>1</sup> 5 & 6 Vic. c. 76, § 2.

<sup>2</sup> 18 & 14 Vic. c. 59, § 1.

<sup>3</sup> *Ibid.* § 30.

<sup>4</sup> See wording of 18 & 19 Vic. c. 55, § 2.

Council of New South Wales apparently contemplated no immediate alteration, for it provided that the boundaries of New South Wales should be (certain lines of latitude and longitude), "save and except the Territories comprised within the Boundaries of the Province of South Australia and the Colony of Victoria as at present established."<sup>1</sup> This enactment passed the legislature of New South Wales on the 21st December 1853.<sup>2</sup>

But when the Imperial statute sanctioning this latter enactment appeared, it was found to contain a section which substantially altered the territorial rights of Victoria under the former constitution. The operative part of the section is as follows: "It is hereby declared and enacted, That the whole watercourse of the said River *Murray*, from its source therein<sup>3</sup> described to the Eastern Boundary of the Colony of *South Australia*, is and shall be within the Territory of *New South Wales*: Provided nevertheless, that it shall be lawful for the Legislatures and for the proper Officers of Customs of both the said Colonies of *New South Wales* and *Victoria* to make Regulations for the Levying of Customs Duties on Articles imported into the said Two Colonies respectively by way of the River *Murray*, and for the Punishment of Offences against the Customs Laws of the said Two Colonies respectively committed on the said River, and for the Regulation of the Navigation of the said River by Vessels belonging to the said Two Colonies respectively: Provided also, that it shall be competent for the Legislatures of the said Two Colonies, by Laws passed in concurrence with each other, to define in any different Manner the Boundary Line of the said Two Colonies along the Course of the River *Murray*, and to alter the other Provisions of this Section."<sup>4</sup> In other words, the colony of Victoria is deprived of her whole territorial interest in the bed of the river Murray, and, by a well-known rule of law, her officials and inhabitants commit a trespass every time they sail upon its waters, except so far as their acts may be held to be impliedly justified by the acquiescence of the Government of the sister colony, and by the jurisdictional powers conferred on Victorian officials by the section. The final permission to the legislatures of the two

<sup>1</sup> 16 & 17 Vic. (N. S. W.), No. 41.

<sup>2</sup> Cf. Sched. (1) to 18 & 19 Vic. c. 54.

<sup>3</sup> *I.e.* In the 13 & 14 Vic. c. 59, § 1.

<sup>4</sup> 18 & 19 Vic. c. 54, § 5.

colonies to alter the provisions of the section by concurrent legislation, is equivalent to a permission given to the heir of an English estate to share his inheritance with his younger brother.

What is the explanation of the section? It is stated in the preamble that "Doubts have been entertained as to the true Meaning of the said Description of the Boundary of the said Colony." But this can hardly be intended as a serious explanation. The second section of the Act of 1850 made the two colonies riparian owners in the ordinary way, and the rights of riparian owners are settled by the common law. Still less can the operation of the new section be regarded as a *bona-fide* solution of any such difficulty. It is enactment, not explanation, as its own words practically admit. No reference was, apparently, made to the section in the course of its passage through the Imperial Parliament, and its origin remains a mystery which can only be solved by a search into the archives of the Colonial Office.

A rather interesting question presents itself when we attempt to ascertain the exact legal position of the Constitution of 1855. We have seen that the course of proceeding was thus. The legislature of Victoria framed a Constitution Act, which was reserved for the royal assent. On its arrival in England, certain of its clauses were struck out, and Parliament was asked to empower Her Majesty to assent to the measure as amended. This Parliament did, but, at the same time, imposed certain conditions of its own, which duly became law. But it did not expressly enact the colonial measure, even in its amended form. Finally, the royal assent, in terms of the Imperial statute, was given to the colonial measure *as amended*.

How far was this curious process in accordance with law?

By the 14th section of the Constitution of 1850,<sup>1</sup> the Governor of Victoria, with the advice and consent of the Legislative Council, was empowered to make laws for the colony, provided that such laws should not be repugnant to the laws of England, nor attempt to interfere with the management of the Crown lands or Land revenue. By the 32d section of the same statute, the same authority is empowered by any Act to alter the constitution of the legislative bodies, subject to the

<sup>1</sup> 13 & 14 Vic. c. 59.

provision that such Act shall not only be reserved for Her Majesty's pleasure, but that, before Her Majesty's pleasure shall be signified, a copy of the measure shall be laid before the Imperial Parliament for at least thirty days. The following section expressly continues the operation of the older statutes<sup>1</sup> with regard to bills reserved under the Act of 1850, and a reference to these measures is therefore necessary to secure an exact view of the question.

The 5 & 6 Vic. c. 76<sup>2</sup> provides that no bill which has been reserved for Her Majesty's pleasure shall have the force of law until the royal assent to the same has been signified by the Governor, and such signification must take place, if at all, within two years from the presentation of the bill to the Governor for assent. And the statute also provides<sup>3</sup> that every bill altering the constituencies for the Legislative Council, or the number of members having seats therein, or the salaries of the Governor, Superintendent, or judges, *shall* be reserved for the royal assent. The 7 & 8 Vic. c. 74 is purely technical as regards this subject, merely obviating a possible construction of the older statute which might insist that the Governor was bound to reserve any bill falling under this head, even though he refused his assent to it.<sup>4</sup>

This being the law of the case, let us see how the facts agree with it. The measure passed by the Council was clearly "repugnant to the law of England." Moreover, it obviously interfered with the disposal of Crown lands, for it professed to hand them over to the colonial legislature, to say nothing of the fact that it affected to repeal half a dozen Imperial statutes.<sup>5</sup>

It is clear, then, that not only did the Council, in passing the measure, greatly exceed the powers of legislation conferred upon it by the Constitution of 1850, but, by affecting to repeal Imperial statutes,<sup>6</sup> it rendered it impossible for the Crown to assent to it without parliamentary sanction.

In any event, the measure was obviously one which the Governor was bound to reserve for the royal assent. And there can be little doubt that if the Imperial Parliament had chosen

<sup>1</sup> *I.e.* the 5 & 6 Vic. c. 76, and 7 & 8 Vic. c. 74.

<sup>2</sup> § 33.

<sup>3</sup> § 81.

<sup>4</sup> *Cf.* 7 & 8 Vic. c. 74, § 7.

<sup>5</sup> *Cf.* Sched. (2) of Constitution Act.

<sup>6</sup> It is true that the repeal took the form of a postponement of the operation of the Colonial Act until the repeal of the Imperial statutes by the Imperial legislature, but the effect was obvious.



to empower Her Majesty to assent to the measure as it stood, they would have waived any right to object to it afterwards as conflicting with Imperial interests, and that, though not in precise terms complying with the requirements of the enabling section,<sup>1</sup> it would have been regarded as good law.

But, as we have seen, Her Majesty's advisers objected strongly to one or two of the clauses contained in the colonial bill, and did not ask Parliament to authorise her assent to the measure as it stood. They altered the wording of the measure, and then asked Parliament to empower Her Majesty to assent to a measure which the Victorian legislature had *not* submitted. And Parliament itself, while granting the authority, took the opportunity of making one or two alterations on its own account, not by further amending the text of the colonial bill, but by including new sections in the enabling statute. In fact, then, Her Majesty did not assent to the bill passed by the colonial legislature, but to a draft approved by the Colonial Office.<sup>2</sup>

There is another alternative. Had the Imperial Parliament chosen to *enact* the terms of the amended draft, there can be no doubt that, though in form violating the spirit of the concessions made to the Australian colonies, the measure would have been valid as an Imperial statute. The Parliament did in fact take this course with regard to the provisions for the transfer of the Land fund, and the repeal of the older statutes,<sup>3</sup> and there can be no doubt, therefore, that these provisions are good law. But it expressly declined to take this step with regard to the general provisions of the measure. The constitution cannot, therefore, be accepted as an Imperial statute.

One other alternative remains. In old times the constitutional rights of the colonies had been granted by Crown charters. The practice had disappeared before the advance of self-government, but it had never been formally abandoned. If Her Majesty chose to grant and the colony of Victoria to accept a constitutional charter, and the Imperial Parliament expressly sanctioned the scheme, who could object? It is possible that the Constitution Act may be supported on this ground.

The question was actually raised in the colony, soon after

<sup>1</sup> 13 & 14 Vic. c. 59, § 14.

<sup>2</sup> The same practice has been since followed, to a very slight extent, in the Western Australia Constitution Act of 1890 (53 & 54 Vic. c. 26).

<sup>3</sup> 18 & 19 Vic. c. 55, §§ 2-4.

its arrival, by Mr. Grant, who on the 15th February 1856 succeeded in carrying a motion for an Address to the Governor, requesting him to take the advice of the law officers as to "the validity of the New Constitution Bill for this colony, by reason of its having undergone alterations and amendments in Parliament, without the concurrence or sanction of this House."<sup>1</sup> The Governor promised assent,<sup>2</sup> and on the 18th March laid the opinion of the law officers on the table of the Council.<sup>3</sup> The opinion, which was signed by both the Attorney and Solicitor-General,<sup>4</sup> while upholding the legality of the Act, said, "we attribute its efficacy, not to the power of the Colonial but of the Imperial Legislature, and the assent given by Her Majesty in Council to the Bill as above amended."<sup>5</sup> It is difficult to discover precisely what this opinion means.

<sup>1</sup> *V. and P.*, sub date.      <sup>2</sup> *Ibid.* 26th February 1856.      <sup>3</sup> *Ibid.* sub date.

<sup>4</sup> Mr. Stawell and Mr. Molesworth.      <sup>5</sup> *V. and P.*, 1855-6, ii. p. 783.

## CHAPTER XXII

### THE CHANGE TO RESPONSIBLE GOVERNMENT

PERHAPS few people foresaw the difficulties which would attend the introduction of the new scheme of government. But then few people were aware, few are yet aware, of the peculiarities of the Cabinet system. That system has grown up so unconsciously in English politics, that its full intricacy and peculiarity are rarely recognised. Till Mr. Bagehot published his famous essay, in the year 1867, scarcely any writer had explained the idiosyncrasies of the position. In a dim way, English statesmen and English writers had felt that the system under which they lived was essentially different, on the one hand, from the bureaucratic monarchy, such as Prussia, where the Crown was everything and the Parliament merely an appendage; and, on the other hand, from the true republic, such as ancient Rome or modern Switzerland, where the assemblies actually and formally appointed the executive for a limited period, and where executive and legislature remained largely independent in action. But although the difference was felt, it was hardly expressed, and there were some conservative theorists who still held to the view that Cabinet and Premier were anomalies which had no true place in the British constitution, that the real head of the government was the Lord President of the Council, carrying out the personal views of the Crown, and dependent actually on the Crown's pleasure for his continuance in office.

Reserving for a future chapter the statement of the true nature of "Cabinet" or "Responsible" government, we may turn here to examine its genesis in Victoria. And the first thing we notice is the strange lack of allusion to the impend-

ing change in the constitutional documents of the period. The Imperial statute which authorised the assent to the Constitution Act makes no reference to it. It is believed that the word "Cabinet" occurs nowhere in the text of the Act, and that the word "Responsible," as applied to Ministers of the Crown, only occurs once, viz. in Schedule D, part 7.<sup>1</sup>

The implied references to the change in the Constitution Act are very scanty. They occur in the 17th section, which provides that members of the legislature accepting offices of profit under the Crown during pleasure, though thereby vacating their seats, may be re-elected if otherwise eligible; the 18th, which provides that, of certain officials named, at least four shall be members of the legislature; the 37th, which enacts that appointments to public office under the Government of Victoria shall be in the hands of the Governor and Executive Council, "with the Exception of the appointments of Officers liable to retire from Office on Political Grounds, which appointments shall be vested in the Governor alone"; the 48th, which authorises the *Governor* (alone) to abolish certain political offices (mainly Cabinet offices); the 50th, which provides pensions for the existing incumbents of certain offices who "on political grounds may retire or be released from any such Office;" and the 51st, which provides pensions for future Cabinet Ministers.

If we turn from the legislative to the executive side of the change, we find that the new arrangements occasioned the issue of a new Commission and Instructions to the Governor. But yet the difference between these documents and those which they replace is exceedingly small to the lay mind. In the Commission, the Governor is empowered himself to appoint the members of the Executive Council, merely transmitting notice of the appointments to the Colonial Office, instead of, as formerly, making temporary appointments till the pleasure of the Home government is known. But the appointments are still to run in the Queen's name, and during her pleasure.<sup>2</sup> The grants of waste lands are to be made with the advice of the Executive Council, and conformably to colonial legislation.

<sup>1</sup> The word occurs also in the *margin* of §§ 18 and 51.

<sup>2</sup> The word in the original, "Our," is the result of an erasure. The actual form of appointment to the Executive Council is by letters-patent under the seal of the colony, attested by the Governor, and countersigned by a Minister.

In the event of the incapacity of the Governor, and of any Lieutenant-Governor who may have been appointed, the Senior Military Officer is to take the first place.<sup>1</sup>

These are almost the only changes in the Commission, and though they are really important, it requires a trained eye to see *why* they are important. In the Instructions which accompanied the Commission, almost the only material change is the power given to the Governor to appoint a member of the Executive Council to preside during his absence, the old rule being that the senior member presided as of course.<sup>2</sup>

With these somewhat scanty guides, it is not surprising that the persons upon whom the task of effecting the change was cast should find some little difficulty in carrying it out. On the 23d November 1855, a Government Gazette Extraordinary proclaimed the coming into operation of the Constitution Statute and the Waste Lands Acts Repeal Act, the former having been (as the proclamation stated) received in the colony at 10 P.M. on the 23d October preceding.<sup>3</sup> In due course, on the motion of the Attorney-General, the proclamation was ordered to be entered upon the journals of the existing Legislative Council, and a duplicate sent to the Registrar of the Supreme Court for enrolment.<sup>4</sup> But before this happened, troubles had begun.

The Governor had consulted his officials with regard to the meaning of the new Act very shortly after its arrival,<sup>5</sup> and we find that on the 31st October 1855 the law officers, in answer to His Excellency's questions, had advised—

1. That according to the provisions of the Constitution Act four of the officers referred to in the 18th section must, from the time of the return of the writs to the first election under the new scheme, or

<sup>1</sup> This was contrary to the old rule, which gave the position to the senior member of the Executive Council. But, under the old *régime*, executive councillors were Imperial officials.

<sup>2</sup> Copy of Commission and Instructions in *G. G.*, 1855, ii. p. 584.

<sup>3</sup> *G. G.*, 23d November 1855. The announcement of the date of arrival was made to satisfy the 5th section of the Constitution Statute. Cf. opinion of law officers in *V. and P.*, 1855-6, ii. p. 575.

<sup>4</sup> *V. and P.*, 21st December 1855.

<sup>5</sup> On the 30th October, at a meeting of the Executive Council, the Governor had decided, contrary to the wishes of his Ministers, to summon the Legislative Council for the 21st November, in order that it might be in session when the Constitution Act was proclaimed. (Minutes of the Executive Council, sub date.)

at least from the meeting of the legislature, be members of one House or other of the legislature.

2. That to a certain extent the officers mentioned in that clause have always been responsible to the existing Council ; nor, indeed, with the exception of the necessity of a certain number being elected members under the 18th clause, do the new Acts make any legal change in their responsibility, though practically they may henceforth be more liable to be removed and called to account according to the feelings of the legislative bodies than heretofore.
3. That their responsibility to the existing Council legally remains unaltered.<sup>1</sup>

With due deference to the opinion of so high an authority, it may well be questioned whether these opinions are sound. The confusion is between moral and legal responsibility. Hitherto the responsibility of the executive officials to the Legislative Council (it is clear that it is to the Legislative and not the Executive Council that the law officers are referring) had been wholly of the former character. The legislature might oppose the policy of the officials as much as it pleased, but it could not force them to resign, and the constituencies had no chance of expressing their opinions ; for the seats of the officials were nominee, not elective, and a dissolution, whilst it might strengthen the Government, could not defeat it. Practically speaking, an official could only be dismissed for personal misbehaviour or incapacity, and the Governor's dismissal of him was always liable to review by the Home authorities.

But the new Act made a substantial difference, for not only did it abolish all nominee seats, and subject Ministers accepting office to re-election, thereby giving the constituencies a voice in their appointment, but it guarded against the attempt to carry on the government by a Ministry independent of the legislature, by providing that at least four members of the Ministry *must* be members also of the legislature.

Acting, however, upon the advice of his law officers, the Governor summoned a meeting of the existing Executive Council for Tuesday the 6th November to frame the Estimates to be laid before the legislature.<sup>2</sup> But when the Council met, instead of proceeding to business, the members handed in a protest, in which they stated that they felt unable to commence unless

<sup>1</sup> *V. and P.*, 1855-6, ii. p. 576.

<sup>2</sup> *Ibid.* p. 577.

they were informed whether they were expected to act "as Responsible Officers under the Constitutional Act, or as Officers responsible to His Excellency for carrying out the policy which he may indicate." The protest further stated that "as the responsibility of the Government to the country commences on the day upon which the Council<sup>1</sup> is summoned, such Estimates as may come before the country will have to be defended by a Responsible Ministry, although they may not have been prepared by them in that capacity." And the protesters decline to state what in their own opinion is the right course.<sup>2</sup>

The Governor promptly replied that the responsibility of officers would commence from the date of the *proclamation*, and that no departure from the existing form of government or routine would be allowed till then; but at the same time he offered either to allow the officers to postpone framing the Estimates, if they wished, or to take upon himself the responsibility of them when laid before the Council.<sup>3</sup>

At this point our sources of information become traditional only until the issue of the proclamation and the assembling of the Legislative Council on the 23d November, up to which date the protesting officials continued to occupy their posts.<sup>4</sup>

On the following day the Colonial Engineer stated to the Legislative Council that four members of the government, the Colonial Secretary,<sup>5</sup> the Attorney-General,<sup>6</sup> the Collector of Customs,<sup>7</sup> and the Surveyor-General,<sup>8</sup> had tendered to the Governor the resignation of their offices, which had been accepted.<sup>9</sup> The announcement was so startling that Mr. Fawcner, having procured a suspension of the Standing Orders, moved and carried a resolution that the Council should resolve itself into a committee of the whole to consider the state of the colony.<sup>10</sup> After a very short sitting the committee reported that the Governor should be addressed to afford the

<sup>1</sup> *I.e.* (obviously) the Legislative Council.

<sup>2</sup> *V. and P.*, 1855-6, ii. p. 577.

<sup>3</sup> *Ibid.*

<sup>4</sup> Cf. notices signed by them in *G. G.*, 6-23 November 1855. Captain Lonsdale's resignation of the office of treasurer had been accepted at a meeting of the Executive Council held on the 22d November.

<sup>5</sup> Mr. W. C. Haines.

<sup>6</sup> Mr. Stawell.

<sup>7</sup> Mr. H. C. E. Childers.

<sup>8</sup> Captain Andrew Clarke.

<sup>9</sup> *V. and P.*, 24th November 1855.

<sup>10</sup> *Ibid.* 27th November 1855.

Council full information respecting the dismissal or resignation of the officials, and the Council promptly adopted the recommendation.<sup>1</sup>

The Governor immediately promised compliance with the request, but before he could fulfil his promise another startling announcement was made to the House, by letter from the acting Colonial Secretary, Mr. Moore, to the effect that the Governor had been pleased to release from office, "on political grounds," the four officials previously announced as having resigned, and that thereupon their nominee seats in the Council had become vacant. The acting Colonial Secretary also informed the Council that the Colonial Engineer and the acting Solicitor-General had resigned their nominee seats.<sup>2</sup>

Following immediately upon this announcement came the further information that the Speaker had received letters-patent, dated the same day, appointing Mr. Haines (as Chief Secretary), Mr. Stawell (as Attorney-General), Mr. Sladen (as Treasurer), Mr. Pasley (as Commissioner of Public Works), Mr. Childers (as Commissioner of Trade and Customs), Mr. Clarke (as Surveyor-General), and Mr. Molesworth (as Solicitor-General), to nominee seats in the Legislative Council pending the signification of Her Majesty's pleasure. The members named then entered and took their seats.<sup>3</sup>

Immediately afterwards, the papers requested by the Address of the previous day were laid before the Council.<sup>4</sup> These papers, when produced, showed that, in addition to the facts before enumerated, the following had been the course of events which had led up to these results.

On the 23d November, apparently before the opening of the session of the Council, the Governor had sent to the Colonial Secretary (Mr. Haines) a "Minute transmitting his views regarding the Future Administration of the Government of the Colony." The Minute is expressed to be "for the information and guidance of the responsible officers," and it is probable, therefore, that at the time of penning the letter of enclosure the Governor regarded his existing ministry as "responsible."

Apart from this point, the document is of the highest importance as expressing the views of a colonial official of

<sup>1</sup> *V. and P.*, 27th November 1855.

<sup>2</sup> *Ibid.* 28th November 1855.

<sup>3</sup> *Ibid.* They were sworn in afresh on the 30th November. (Minutes of Executive Council of that date.)

<sup>4</sup> *Ibid.*



great position with regard to the change introduced by the new constitution. Briefly put, the views of the Governor on the subject may be stated thus:—

1. The Governor must choose as his Ministers persons acceptable to Parliament, and must accept their resignations when it is evident that they are no longer so acceptable.
2. But he cannot be forced to appoint persons in whom he cannot place confidence, for that would be to betray his trust as the Crown's agent. He is responsible to the Crown, as they are to the Parliament.
3. Every measure<sup>1</sup> submitted to Parliament must previously receive the sanction of the Governor, and refusal to sanction a measure advocated by the Ministers will be a good ground for resignation, but not for persistence in the measure. Yet the Governor does not desire "to interfere with the arrangements of the Ministry, or be a party to their consultations."
4. The 37th clause of the Constitution Act, vesting the appointments to public offices in the Governor with the advice of the Executive Council, must be understood to give the Governor a substantial voice in the disposal of patronage, and the Governor will not sanction "the appointment of persons whose *sole* recommendation may be advocacy of certain political principles."
5. Communications with and appointments by the Governor are to be conducted through the medium of the Colonial Secretary. The only exception to this rule is the case of communications between the Governor and the Attorney-General.
6. Each official will take charge of the business of his own department, without directions from the Governor.
7. No discussion of policy is to be allowed at meetings of the Executive Council, except in the single case of death sentences, as to which the Governor retains his old position.<sup>2</sup>
8. The Governor still retains the sole authority in military and naval matters.<sup>3</sup>

When the contents of this Minute became known, they excited loud opposition, but it is very doubtful if Sir Charles Hotham really intended by them anything derogatory to the theory of Responsible Government. The most exceptionable points are those relating to the principle of public appointments (including the Ministerial offices) and the sanction required to the introduction of measures. But dispassionately

<sup>1</sup> So the text. It is possible that it may mean only "Government measure," or Sir Charles may have thought that the old practice which required that all legislation should initiate with the Ministry should be continued.

<sup>2</sup> Sir Charles Hotham had, on the 1st November, commuted a death sentence against the views of his ministers. (Minute of Executive Council, sub data.)

<sup>3</sup> Copy in minute of *V. and P.*, 1855-6, ii. p. 581.

read, and read in the light of surrounding circumstances, it seems most probable that by his expressions the Governor simply meant that he reserved the right, as an Imperial representative, to veto appointments and measures which he regarded as absolutely pernicious. And, regard being had to the cautious wording of the Constitution Act, it hardly seems clear that he was wrong in this view, while his announcement of his intention to take no part in the deliberations of the Cabinet and to receive communications and exercise patronage only through the Premier,<sup>1</sup> shows that he accepted some at least of the most important principles of Responsible Government.

Although, as has been said, this document afterwards provoked much discussion, it does not appear to have had much immediate effect on the mind of the officials immediately concerned, for we find the latter, a few days afterwards, admitting that it did not appear to them to need immediate reply.<sup>2</sup>

It is probable, therefore, that this Minute, though received on the morning of the 23d November,<sup>3</sup> was not the subject of the conversation which Mr. Haines had with the Governor prior to the opening of the Council on that day, and to which he alludes in his letter of the 24th.<sup>4</sup> The object of this letter is to request the Governor to "relieve myself and my colleagues from the very embarrassing position in which we find ourselves placed," and its meaning is explained by a second letter addressed by the Attorney-General to His Excellency on the same date, and which was forwarded on the morning of Sunday the 25th,<sup>5</sup> by Mr. Haines himself, to the Governor. From Mr. Haines's last letter we gather that he (Mr. Haines) had had another interview with the Governor on the preceding (Saturday) evening, on the mysterious subject which was troubling him, and that the Attorney-General's opinion on the topic had been taken at the Governor's request.<sup>6</sup> The opinion stated that the officials holding under commissions granted

<sup>1</sup> The actual words used are "Colonial Secretary." But at this time the Colonial Secretary had precedence by Royal Instructions of 11th March 1852. (Original in Treasury office at Melbourne.)

<sup>2</sup> *V. and P.*, 1855-6, i. p. 768.

<sup>4</sup> Copy in *ibid.* ii. p. 577.

<sup>6</sup> Copy in *ibid.* p. 578.

<sup>3</sup> Cf. *ibid.*

<sup>5</sup> *Ibid.* p. 578.

before the proclamation of the Constitution Act are politically irresponsible under the old Act, while at the same time "they continue to hold offices, the occupants of which are responsible not merely legally but politically; and thus their position is most anomalous." And the Governor is advised that "new commissions should be issued to all officers who it is contemplated are to become politically responsible."<sup>1</sup>

Hereupon, on the following day, the 26th November, the Governor sent a circular letter to each of the four officials whose resignations of office, when announced in the Council on the 27th November, caused so much excitement. The circular announced to each official that, it being necessary to form a new Ministry under the Constitution Act, he would consider himself released "on political grounds" from his office.<sup>2</sup> Each official thereupon wrote, accepting his dismissal, and laying claim to a pension under the Constitution Act (§ 50).<sup>3</sup> It will be remembered, however, that the first announcement in the Council, on the 27th November, was an announcement of *resignation*, not of dismissal.<sup>4</sup> The announcement of dismissal was not made till the following day.<sup>5</sup>

Such was the record of events which was laid before the Legislative Council on the 28th November 1855, and read aloud by the Clerk.<sup>6</sup> On Mr. Haines's own motion they were printed, and set down for consideration on the 4th December.<sup>7</sup> On that day Mr. Greeves brought forward a series of resolutions emphatically condemning the transaction, and the removals and appointments consequent on it, as "premature, illegal, and void," and censuring the officials for taking office under the Minute of the 23d November,<sup>8</sup> which, however, by this time had been practically withdrawn by the Governor, after a formal protest from the new Ministry.<sup>9</sup> On the 5th December Mr. Campbell, apparently in ignorance of the later facts, proposed to substitute for Mr. Greeves's sweeping resolutions a simple expression of regret that the officials had not seen fit to protest against the Minute, and a protest against it by the house itself.<sup>10</sup> Upon a vote this amendment was vetoed by

<sup>1</sup> Copy in *V. and P.*, 1855-6, ii. p. 578.

<sup>2</sup> *V. and P.*, 1855-6, ii. p. 579.

<sup>3</sup> *Ibid.* pp. 579, 580.

<sup>4</sup> *Ibid.* sub date.

<sup>5</sup> *Ibid.* sub date.

<sup>6</sup> *Ibid.* 28th November 1855.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* 4th December.

<sup>9</sup> See documents in *V. and P.*, 1855-6, i. p. 763.

<sup>10</sup> *Ibid.* sub date.

the deciding voice of the Speaker, but when the substantive resolutions were put, they again were lost by a single vote, the officials implicated all voting against them.<sup>1</sup>

Apparently this ended the matter. The Ministers were all returned to seats in the first elections for the Legislative Assembly, which took place in the spring of 1856,<sup>2</sup> they met the new Parliament as a Cabinet, and resigned on the passing of an unfavourable resolution upon the subject of the Estimates, in March 1859.<sup>3</sup> Mr. O'Shanassy, the mover of the resolution, was then, in accordance with Cabinet practice, invited to form a Ministry.

The question naturally presents itself, How far was all this manipulation necessary to secure the introduction of Responsible Government? Let us state in brief form the process of events actually proved.

1. 23d November 1855. Proclamation of the new constitution.
2. 26th November 1855. Release of the four officials "on political grounds," by letter from Governor sent at request of officials themselves.
3. 27th November 1855. Announcement in Leg. Council that the four officials had *resigned*.
4. 28th November 1855. Announcement in Leg. Council that the Governor had released the officials "on political grounds," and that their nominee seats in Council had thereby become vacant.
5. (Same day.) Announcement in Leg. Council that the same four officials had been re-appointed to the same four offices,<sup>4</sup> that three other officials had been appointed, and that the seven were temporarily appointed to nominee seats in the Leg. Council.

It is really hard to see why all this process should have been necessary, in fact, to see where at all the difficulty lay. There was a Ministry in existence, its members duly appointed, in the same form as Responsible Ministers. Four of these were members of the Legislative Council. Why could they not continue to hold office till the Parliament met in its new

<sup>1</sup> *V. and P.*, 5th December 1855. On the 10th the officials renewed their oaths of office.

<sup>2</sup> *G. G.*, 7th November 1856.

<sup>3</sup> Victorian Hansard, i. p. 552.

<sup>4</sup> The names of the offices were slightly altered, but practically they were the same.

form? If at the elections four of them had not succeeded in being returned, then there would have been obvious necessity for a reconstruction, entire or partial, of the Ministry. If they had been returned and been met by a vote of want of confidence, then would have been the time to resign. Both these cases were provided for by the 50th section of the Constitution Act.

To this obvious course there seem to have been two objections taken, both of which were groundless.

The first was, that from the proclamation of the new Constitution the officials were intended to be "Responsible," *i.e.* elected members of Parliament, whose constituents could express their opinion of them upon their vacating their seats for re-election. But it was impossible that this test should be applied till the new Parliament met, and, as we have seen, when the officials were re-appointed, they took nominee, not elective seats.

The second objection seems to have been that, until re-commissioned, the officials were bound to act as the Governor's subordinates, and that consequently, when they faced the Parliament, they would be called upon to defend a policy which might not really be their own. But, as we have also seen, the Governor had obviated this difficulty by offering to take the responsibility of their actions up to the assembling of Parliament. Legally, their positions were precisely the same under both systems. In both cases they were appointees of the Crown; only, under the Responsible system, as a matter of constitutional understanding, the Governor would be bound to follow the views of Parliament in the matter of appointments and dismissals, instead of the views of the Colonial Office. But the new system could not possibly operate until a Parliament in the new form was summoned, for no expressions of opinion by the existing Legislative Council could affect the holders of non-elective seats.

It seems, therefore, abundantly clear that the officials should have stood by their existing appointments till the meeting of Parliament. By the course they took they laid themselves open to grave suspicion of personal motives, and only avoided the disgrace of a condemnatory resolution by the doubtful expedient of voting for themselves.

## CHAPTER XXIII

### GENERAL CONDITION OF VICTORIA IN 1855

As the chief ostensible ground for the grant of Responsible Government was the increased material prosperity of the colony, it may be well to pause for a moment, as at the end of former periods, to glance at the general condition of Victoria on the eve of the new system.

That the discovery of gold had produced a startling effect upon the circumstances of the colony is of course beyond doubt. But it will be better if we confine ourselves to pointing out a few of the unquestioned facts which helped to constitute the change.

We have already noticed the condition and extent of the Government revenue and expenditure at the period of Separation.<sup>1</sup> During the year 1854, less than four years after Separation, the general revenue had risen from £122,781 to £1,726,935. To this had been added a sum of £601,155 from the Land revenue (afterwards to be explained), and a sum of £118,619, surplus from the previous year, making a grand total of £2,446,710. Of the ordinary general revenue, the chief items were as follow:—

1. Customs	.	.	.	.	£853,598
2. Gold revenue	.	.	.	.	423,920
3. Trade licences	.	.	.	.	151,555

But against this large income there had been the enormous expenditure of £4,479,527,<sup>2</sup> or a deficit of upwards of two millions sterling. The chief items were—

<sup>1</sup> *Ante*, p. 137.

<sup>2</sup> Of this, however, £400,000 was repayment of loans (*V. and P.*, 1855-6, i. p. 1071).

1. Customs . . . . .	£104,080
	(nearly one-eighth of the receipts)
2. Police . . . . .	535,505
3. Military and Naval . . . . .	126,324
4. Public Works . . . . .	1,330,817
5. Stores and Transport . . . . .	634,485
6. Education . . . . .	87,835
7. Civil List (Sched. B) . . . . .	128,784
8. Commissioners of Sewers and Water Supply . . . . .	383,900 <sup>1</sup>

The startling amount of the items for police, military and naval, and store charges, are, of course, accounted for by the unhappy disturbances which took place on the gold fields in the year 1854, and to the symptoms of lawlessness which the attractions of the gold discovery had developed. Of the huge item for "Public Works," nearly one half is occasioned by the cost of making and repairing roads and bridges,<sup>2</sup> and the bulk of the remainder by the erection of and repairs to public buildings in Melbourne, Geelong, Williamstown, Portland, and Belfast.<sup>3</sup>

The huge deficit in the year's accounts was met by loans raised hastily in all directions. The corporation of Melbourne contributed £300,000. The appropriated moiety of the Land fund was drawn on for £866,000. The local banks advanced £290,000 as a first loan, and allowed overdrafts to the extent of £232,000 in addition. Nearly £40,000 was borrowed from the Police Reward Fund.<sup>4</sup> It is satisfactory, however, to notice that of these loans £400,000 were paid off before the close of the year.<sup>5</sup>

We have seen<sup>6</sup> that the "unappropriated" moiety of the Land fund was by this time practically under the control of the colonial legislature, and that in this exceptional year a draft was also made upon the moiety still nominally appropriated by the Imperial government to the expenses of immigration. But the accounts of the Territorial revenue were still kept distinct from the general income of the Government, and from the returns for the year 1854 we learn that they had produced the total of £1,355,832, of which about nineteen-

<sup>1</sup> Abstract in *V. and P.*, 1855-6, i. pp. 1063-1071.

<sup>2</sup> Apparently the work was not effected by the Central Road Board, *ibid.* p. 1067.

<sup>3</sup> Statement in *ibid.* p. 1073.

<sup>4</sup> *Ibid.* p. 1070.

<sup>5</sup> *Ibid.* p. 1071.

<sup>6</sup> *Ante.* p. 179.

twentieths were the produce of the sale of 400,000 acres of land, the occupation licences producing £46,000.<sup>1</sup> The expenses chargeable upon the fund, including the charges of the Surveyor-General's department and the expenses of the immigration offices at Melbourne, Williamstown, Geelong, and Portland, amounted to upwards of half a million sterling, leaving, with the balance left over from the previous year, a sum of about one million and a half, which on this occasion was transferred to the general revenue in manner before described.<sup>2</sup>

The expenses of the permanent Civil List for the year had been kept, as we have seen, well within the revenue assigned to it. It must be remembered that the List had been increased from the £20,000 provided by the Constitution Act of 1850 (Sched. B) to £157,839, by various Acts of the colonial legislature.<sup>3</sup> The expenses of the judicial department had risen from the £6,500 contemplated by the Constitution Act to £79,000, those of the executive administration from £5,500 to £49,000. The expenses of the ecclesiastical establishment alone remained stationary.<sup>4</sup> But in each of the former cases the expenses had been kept within the income, and there was a total balance of nearly £30,000 to go towards the dire needs of the unappropriated expenditure.<sup>5</sup>

Happily the accounts for the year 1855 were infinitely better. Though they only go down to the date of the proclamation of the new Constitution (23d November), the revenue shows an amount (£1,595,667) nearly equal to that of the preceding twelve months, while the expenditure has fallen to £1,319,544, or an amount well within the revenue. With the help of a sum of £300,000 from the unappropriated moiety of the Land fund, the Treasurer is able to pay off half a million in reduction of the debt. The saving has been effected in various ways. The expenses of the Customs department have been reduced by one-half, though its revenue has substantially increased, the police expenses are also reduced by one-half, while the expenditure on Public Works has been cut down to nearly one-third of its former amount. The "Stores

<sup>1</sup> *V. and P.*, 1855-6, i. p. 1078.

<sup>2</sup> *Ibid.* p. 1085.

<sup>3</sup> 16 Vic. No. 7 (180), 17 Vic. No. 7, and 18 Vic. No. 35.

<sup>4</sup> *V. and P.*, 1855-6, i. p. 901. But this does not include the ecclesiastical grants to the Gold Fields, not under the 16 Vic. No. 28.

<sup>5</sup> Accounts in *ibid.* p. 900.



and Transport" item may be said to have almost disappeared. On the other hand, the grants for educational purposes have more than doubled.<sup>1</sup>

It does not follow that the change is necessarily to be attributed to bad administration in 1854. The events of the early "fifties" were so abnormal, that it is no wonder if they paralysed the government which had to deal with them. Men came out to manage a large estate, and they were called upon suddenly to face the problem of governing a community with the interests and revenue of a kingdom. No wonder if they lost their heads. But, at the same time, it would be well if those interested in the reputation of the men of 1854 were to offer some substantial explanation of the facts. If the expenses of a Government department are cut down 50 per cent as the consequence of a Royal Commission, while at the same time the business of the department continues to increase, we require to know the reason of the change.<sup>2</sup>

Passing beyond the limits of revenue and expenditure, we are able to gain very valuable information as to the general condition of the colony towards the close of the period from the full statistics laid before the Parliament in December 1856.<sup>3</sup>

From these it appears that at the close of the year 1855 the total population of the colony (exclusive of aborigines) was 319,379,<sup>4</sup> in the proportion of about 207,000 males to 112,000 females. During the year the population had been increased by 66,000 immigrations and nearly 12,000 births.

With regard to the pursuits of the population, 4326 persons carried on agricultural operations on 115,000 acres of land, chiefly in the counties of Bourke, Grant, and Villiers. The principal crops were—

1. Wheat, of which	1,148,000 bushels were raised on	42,600 acres.
2. Oats,	614,000	" " " 58,000 "
3. Grapes,	488,000 lbs.	" " " 207 "
4. Barley,	45,000 bushels	" " " 2,285 "
5. Potatoes	59,796 tons	" " " 11,000 "

<sup>1</sup> Accounts in *V. and P.*, 1855-6, pp. 1095-1101.

<sup>2</sup> For details of expenditure in Government departments for year 1855, cf. *V. and P.*, 1855-6, ii. pp. 785-814.

<sup>3</sup> *Votes and Proceedings of the Legislative Assembly*, 1856-7, iv. p. 91.

<sup>4</sup> It appears that the last previous census was actually taken on the 26th April 1854.

Squatting pursuits were carried on at 1029 licensed stations in the various districts. Of these stations the old districts of Portland Bay and Western Port claimed 349 and 253 respectively, the newer districts of the Wimmera, Murray, and Gippsland having 152, 171, and 88 respectively. On these runs rather more than half a million head of horned cattle and rather more than four and a half millions of sheep were fed.

Turning to pursuits of a less patriarchal character, we find that there were a total number of 115 mines or quarries in the colony, of which 63 were either gold-mines or quartz-reefs, while in the counties of Bourke and Grant there were 153 brick-yards.

Of the industries which usually establish themselves in towns there were 1893 at work. By far the greater number of these were connected immediately with the new mining adventures. There were no less than 1267 factories for mining machinery at Sandhurst, 100 at Ballaarat, and 30 at Fiery Creek. Melbourne had lost the lead early established in the number of her factories, being only third in the race to Sandhurst and Ballaarat, though it is, of course, quite possible that many of the numerous "works" at Sandhurst may have been of an elementary character. Unfortunately no returns of the number of hands employed during the year 1855 are given, but in April of the previous year, when the population of the colony was about thirty per cent less than in 1855, the number of persons returned as employed in "Commerce, Trade, or Manufacture" was just short of 53,000.<sup>1</sup>

In the matter of foreign trade, the colony exported during the year 1855 goods to the value of thirteen millions and a half, of which gold and coin accounted for eleven millions, and wool for a million and a half. The imports slightly exceeded twelve millions in value, of which about half a million was coinage, and the rest are unclassified in the Return from which these figures are taken.<sup>2</sup>

The non-material wants of the people were provided for by 349 places of worship, having an average attendance of 65,000 persons, and an estimated capacity of 76,000. It may fairly be inferred, therefore, that the supply in this particular was well abreast of the demand. Amongst the various religious bodies,

<sup>1</sup> *V. and P. of L. A.*, iv. p. 237.

<sup>2</sup> *Ibid.* 1856-7, p. 299.

the Wesleyans stood well ahead in the number of their buildings (104), the Church of England coming next with 81, and the Roman Catholics with 53. In point of average attendance, however, the positions were altered, the Catholics coming first with 21,000, followed by the Wesleyans with 13,000, and the Anglicans with 10,000.

Educational statistics do not appear in the Returns from which we have been recently quoting, but they are obtainable from another source.<sup>1</sup> From this source we learn that, at the close of the year 1855, two rival systems of primary education were at work in the colony—the denominational system and the national system. The former, organised systematically in the year 1849, maintained 300 schools with attendance rolls of 17,711 scholars, or about one in eighteen of the population. The national system, established in the year 1851, had in operation 58 schools, with a total register of 3532 scholars, and an average attendance of 2509. The secondary education of the colony was conducted by 118 private schools, having charge of 3235 pupils. It must be remembered also that in the year 1854 the University of Melbourne had been established, to provide for the wants of advanced students, and was just now beginning active operations. Altogether, at the close of this period, it was calculated that 24,478 individuals, or one person in thirteen of the population, were receiving regular general education, a result which must be weighed in connection with the circumstances of the colony, which showed an unusual proportion of adults to children; but even then it cannot be considered as perfectly satisfactory, the total number of children under sixteen years of age in the colony being 80,000.<sup>2</sup> With regard to the rate of progress of the rival systems, it is evident that the ultimate victory of the national system was even at this date foreshadowed, for in the course of the year 1856 its schools increased from 58 to 82, and its scholars from 3532 to 4804, or an increase of nearly 35 per cent.<sup>3</sup>

Taking it as a whole, there can be no doubt that the period before us is a great period, not merely by reason of the development of material wealth and population, but because also of the statesmanlike work performed. In spite of the almost

<sup>1</sup> *Votes and Proceedings of the Legislative Assembly, 1856-7*, pp. 1013, 1177, and 1245.

<sup>2</sup> *Ibid.* p. 1013.

<sup>3</sup> *Ibid.* p. 1245.

overwhelming difficulties of the situation, the leaders of the period had laid in Victoria the solid foundations of enlightened future prosperity. They had organised the administration of justice and police; established a system of universal education; reformed the financial administration; and started such great institutions as the Public Library, the Museums, and the University. They had provided a system of local government, and organised a provision for the maintenance and extension of the means of communication. They had placed the granting of state aid to religious denominations upon a systematic footing.<sup>1</sup> And they had done this in the face of a social, political, and economic revolution which shook the community to its very centre, and which would have overthrown the civilisation of many a state which had an established tradition of fifteen hundred instead of fifteen years to rely upon. That there were some in high places who preferred their own interest to that of the community few who are familiar with the history of the period can doubt. All the more credit is therefore due to those who, in spite of traitors in the camp, presented an unflinching front to the threats of anarchy and the temptations of private gain.

<sup>1</sup> 16 Vic. No. 28.



**PART IV**  
**RESPONSIBLE GOVERNMENT**  
**(THE EXISTING CONSTITUTION)**



## CHAPTER XXIV

### INTRODUCTORY

WE have now to take a survey of the existing scheme of government in Victoria. And in so doing we shall abandon the historical method hitherto pursued, and adopt the analytical system, which considers phenomena as they are, without tracing the process of their developement. There are good reasons for the change, despite its apparent inconsistency. Not only would a continuance of the historical method involve us in an inquiry beyond the limits at our disposal, but it might necessitate the discussion of questions upon which public feeling is not yet sufficiently calm to allow of an impartial criticism. As a general rule, the abandonment of the historical method will not be found to be a practical inconvenience, for the main outlines of the existing scheme of government were settled by the changes of 1855, and recent developements have, in most cases, been in matters of detail. Nevertheless, where circumstances seem imperatively to demand the course, we may glance at the bare steps of progress between 1855 and 1890.

To bring the subject clearly before our minds, we require a plan which shall be simple, uniform, and comprehensive. We can then class each phenomenon under its proper head, and know where to find it.

In considering the functions of government, we draw a broad line between those which are universal and those which are merely local in their scope. The former always emanate from a single source, and this source we familiarly term the Central Government. The powers of the central government are limited only by the territory controlled by the community



of which it is the organ, sometimes they extend even beyond this limit. The powers of a local government are always limited in exercise to a special area, a division or sub-division of the territory of the community.<sup>1</sup> This, then, will be our first division of the functions we are about to examine—into Central and Local.

But a further sub-division is necessary, and as such a sub-division is ready to hand, familiar to every one, we shall do well to adopt it if possible.

For a very long time it has been common to class the functions of government as legislative, executive, and judicial. It is admitted that the classification is not strictly logical, but it is eminently useful, and sufficiently logical for practical purposes. Where the government lays down general rules for the guidance of conduct, it is exercising its legislative functions. Where it is carrying those rules into effect, it is exercising its executive powers. And where it is punishing or remedying the breach of them, it is fulfilling judicial duties. It by no means follows that the exercise of these different classes of functions is always entrusted to different hands. But, nevertheless, the distinctions between the functions themselves usually exist, both in central and in local matters.

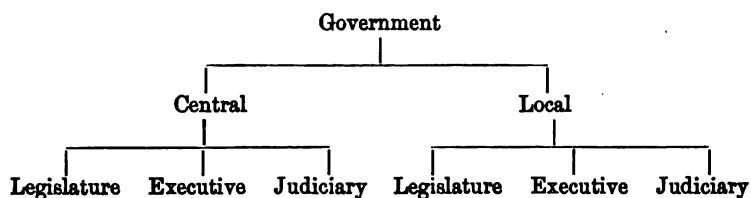
One other question remains. What is the order in which these classes of functions should be discussed? The answer depends entirely on practical convenience, which is usually determined by the relative importance of the various functions in the scheme of government. In the case of Victoria there can be little question that the central government is both older and more important than the local, while of the various functions of each it is as certain that the legislative are at the present time more important than the executive or the judiciary. The legislature can not only change the existing *personnel* of the executive and judicial staffs, but it can completely alter their constitution for the future. The executive can, in most cases, insist upon the dissolution of a part of the existing central legislature. But the legislature cannot be kept in

<sup>1</sup> It must be carefully borne in mind that "central" powers and "supreme" powers are not always synonymous. On the other hand, "local" powers are not always "subordinate."

abeyance for more than a year, and upon its reconstruction the dismissed members may be all returned. The judiciary has no direct influence over the legislature.

It is clear therefore that we shall do well to take the legislature first, although, historically speaking, it is a late development.

And it will, almost as clearly, be wise to take the executive next; for in the Victorian constitution the executive and the legislature are intimately connected, both in the sphere of local and of central government. The executive is appointed by the legislature, is constantly accountable to it, and can be dismissed by it. The judiciary, though practically appointed and occasionally removable by the legislature, is in the exercise of its functions generally independent of the legislature. Thus our plan for the analysis of the subject will be as follows—



## A. CENTRAL GOVERNMENT

### 1. LEGISLATURE

#### CHAPTER XXV

##### THE GOVERNOR

THE Governor, or "the Person for the Time being lawfully administering the Government of the Colony,"<sup>1</sup> is, notwithstanding the grant of Responsible Government, still the official head of the legislature of the colony. Colonial statutes now run in the names of the Crown and the colonial Parliament, instead of, as formerly, those of the Governor and the Parliament; but the assent of the Crown is in ordinary cases the assent of the Governor, and is always signified by the Governor.

It becomes, therefore, our duty, in the first place, to examine the nature of his office. And first, with regard to its creation.

Formerly, as we have seen, each Governor was appointed by special Letters-Patent, which defined the scope of his powers and duties. But in the year 1879, prior to the appointment of the Marquis of Normanby, the office of "Governor and Commander-in-Chief in and over Our Colony of Victoria" was permanently constituted by Her Majesty by Letters-Patent of the 21st February in that year.<sup>2</sup> It is to be observed that in this document the boundaries of the colony of Victoria are defined in accordance with the terms of the Acts of 1842 and

<sup>1</sup> Constitution Act, § 62.

<sup>2</sup> Copy in *Gov. Gazette*, 1879, April 29. In the absence of special appointment the Governor of a British possession is also *ex-officio* Vice-Admiral thereof. (26 & 27 Vic. c. 24, § 3, and 30 & 31 Vic. c. 45, § 4.)

1850, no reference being made to the provision of the 18 & 19 Vic. c. 54.

By the terms of the Letters-Patent constituting the office, the powers and duties of the Governor are defined as follows:—

*a. Powers :—*

- (i). To make grants of Crown lands within the colony according to law.
- (ii). To appoint in the Queen's name, and on her behalf, judges, commissioners, justices of the peace, and other necessary officers and ministers of the colony.
- (iii). To promise pardon to offenders who give Crown evidence, and to grant pardon and remit fines to convicted offenders. (The pardon is not to be granted upon condition of absence except in the case of political offence unaccompanied by grave crime).
- (iv). To exercise the Crown's power of removing or suspending Crown officials on due cause.<sup>1</sup>
- (v). To exercise the Crown's power of summoning, proroguing, or dissolving any legislative body.
- (vi). To appoint a deputy. (See *post*, p. 235.)

*b. Duties :—*

- (i). To have commission read, and to take, in the presence of the Chief-Justice or other judge of the Supreme Court and the members of the Executive Council, the following oaths—
  - a.* Of allegiance. (31 & 32 Vic. c. 72.)
  - β.* Of office.
  - γ.* For the due administration of justice.
- (ii). To keep and use the public seal of the colony.
- (iii). To appoint an Executive Council.
- (iv). To publish the Letters-Patent in such places as he shall see fit.

These powers and duties are further explained by permanent Instructions<sup>2</sup> passed under the sign-manual on the same day as the Letters-Patent. By this document these further powers and duties are conferred on the Governor :—

*a. Powers :—*

- (i). To administer the oath of allegiance and other oaths prescribed by the law of the colony.
- (ii). To summon the Executive Council (which is not to proceed to business until so summoned).

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<sup>1</sup> It was formerly doubted whether the Governor could remove a member of the Executive Council without special Instructions. But the power was expressly granted to Sir Henry Barkly by sign-manual of 10th March 1859 (Original in Treasury offices, Melbourne).

<sup>2</sup> Copy in *G. G.*, 1879, 29th April.

- (iii). To appoint a president for the Executive Council in his (the Governor's) absence.
- (iv). To act in opposition to the Executive Council where he deems such course imperatively necessary, but then to report the matter at once to the Crown.

*b. Duties :—*

- (i). To communicate the Instructions (and all others he shall deem fit) to the members of the Executive Council.
- (ii). To preside (unless prevented) at the meetings of the Executive Council.
- (iii). To see that proper minutes of the business of the Executive Council are kept.
- (iv). To consult the Executive Council in the execution of his powers, except in urgent cases.
- (v). To see that different topics are not dealt with in the same statute, that topics foreign to the title of a statute are not dealt with by it, and that no perpetual clause is made part of any temporary law.
- (vi). To reserve for the royal assent any bill dealing with the following topics, unless it contains a clause suspending its operation till the royal pleasure is known, or unless urgent necessity for its immediate operation exists <sup>1</sup>—
  - a.* Divorce.
  - β.* Grant to Governor.
  - γ.* Currency of colony.
  - δ.* Imposition of differential duties (except as allowed by the Australian Colonies Duties Act 1873). <sup>2</sup>
  - ε.* Matters inconsistent with treaty obligations.
  - ζ.* Discipline of land or naval forces.
  - η.* Royal prerogative, rights and property of British subjects not residing in the colony, or Imperial trade and shipping.
  - θ.* Provisions once refused by the Crown.
- (vii). To transmit reasons in any case where by reason of urgency the Governor has assented to such a bill.
- (viii). To transmit copies of all laws, duly annotated and, where necessary, explained.
- (ix). To transmit copies of journals of legislative bodies and customary returns ("Blue Book").
- (x). To require the presiding judge after any capital sentence to forward a written report of the case ; and to decide upon

<sup>1</sup> And even then, not if it is "repugnant to the law of England," or inconsistent with treaty obligations. But cf. 28 & 29 Vic. c. 63, §§ 2, 3.

<sup>2</sup> This is the 36 Vic. c. 22, which empowers the legislature of any Australian colony (not including New Zealand) to make laws for the purpose of carrying into effect any agreement between it and another colony (including New Zealand), whereby duties are imposed upon or remitted from the importation of the produce of such colonies (including New Zealand), provided that no differential rates are to be imposed.

the final granting or withholding of pardon or reprieve "according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise."

- (xi). To protect and advance the interests of the aborigines.
- (xii). To grant commissions during pleasure only, unless otherwise directed by law.
- (xiii). Not to leave the colony (except for a period not exceeding a month) without leave of the Crown.

These are the principal powers and duties conferred and imposed by the sole authority of the Crown, in addition to those which must be presumed to reside in the Governor by virtue of his commission as commander-in-chief of the forces in the colony. Some of the powers and duties previously enumerated have been confirmed or extended by colonial enactment, but as in most of these cases the intention is obvious that the powers shall be exercised by the "Governor in Council,"<sup>1</sup> i.e. by the Cabinet, it will be better to refer to them at a later stage. In his Imperial capacity, the Governor is not, of course, amenable to colonial legislation, and it is in his Imperial capacity that he is part of the legislature of Victoria.

It is appropriate to notice here, however, two special provisions which have been made for the clearing up of doubts with respect to the Governor's position.

As the Governor is appointed by the Crown during pleasure, the demise of the Crown would, on the ordinary principles of agency, revoke his commission. But as much practical inconvenience might result from a strict interpretation of this rule, it is provided that all acts done in Victoria after such demise, but before the Governor has notified the fact by proclamation in the *Government Gazette*, shall be deemed to be unaffected by the event,<sup>2</sup> and that all appointments made by the Governor in the name of the Crown shall continue valid, notwithstanding.<sup>3</sup>

Moreover, the Governor is empowered to exercise on Her Majesty's behalf the power reserved to the Crown in any grant or document, and to take advantage of any reservation or exception for the benefit of the Crown contained in such document in the same way as the Crown itself might do.<sup>4</sup>

These being the chief features of the office, the actual

<sup>1</sup> There are, however, exceptions to this rule, as, for example, in the case of the provisions of the University Act 1890 (§§ 3, 21, 27, 28).

<sup>2</sup> Constitution Act Amendment Act 1890, § 3.    <sup>3</sup> *Ibid.* § 5.    <sup>4</sup> *Ibid.* § 7.

occupant is appointed to it by a short commission which usually refers to the Letters-Patent and Instructions of February 1879, and nominates the person to whom it is addressed to hold the office during the pleasure of the Crown.<sup>1</sup> The appointment of the Governor is usually revoked by express words in the commission appointing his successor,<sup>2</sup> but it may be impliedly revoked by any act unequivocally manifesting the pleasure of the Crown, or by the death of the Governor. The Governor cannot, of course, resign without the consent of the Crown.

It sometimes becomes necessary that provision should be made for a temporary occupation of the office of Governor, by reason of the latter's death or absence from the colony. For these contingencies a regular succession is provided.

1. If, on the happening of the contingency, there is within the colony a Lieutenant-Governor specially appointed by the Crown, he succeeds to the office.<sup>3</sup> This case has never actually occurred in Victoria since the creation of the Governorship,<sup>4</sup> but, on the 6th November 1886, Sir William Foster Stawell, formerly Chief-Justice, was appointed by royal commission Lieutenant-Governor of the colony, and the commission, which refers to the Letters-Patent of 21st February 1879, clearly entitled him to succeed without further authority upon the death or incapacity of the Governor for the time being.<sup>5</sup> It so happened, however, that Sir William Stawell never assumed the head of affairs as Lieutenant-Governor, though he had previously occupied the position under another title. During the presence of the Governor, the Lieutenant-Governor has no separate constitutional position, but he takes precedence as the second person in the community.

2. If, when a vacancy occurs in the office of Governor, there is no Lieutenant-Governor in the colony, the case is provided for by a standing commission dated 22d February 1879, which provides that the Chief-Justice of the colony for the time being, or, failing him, the senior Puisne judge, shall act as

<sup>1</sup> Cf. commission of the Earl of Hopetoun, dated 22d August 1889 (*G. G.*, 1889, November 28).

<sup>2</sup> Cf. (*e.g.*) clause iii. in *ibid.*

<sup>3</sup> Letters-Patent of 21st February 1879, clause xii. (*G. G.*, 1879, p. 955).

<sup>4</sup> Before the creation of the office of Governor the heads of the government in Victoria were sometimes commissioned as Lieutenant-Governors.

<sup>5</sup> Copy of commission and despatch of Sec. of State in *G. G.*, 31st Dec. 1886.

Administrator of the Government.<sup>1</sup> Under this commission Sir William Foster Stawell administered the government of the colony from 18th April to the 15th July 1884, in the interval between the departure of the Marquis of Normanby and the arrival of Sir Henry Loch.<sup>2</sup>

3. But the Crown may, if it pleases, supersede this standing or "dormant" commission upon any occasion, substituting for the Chief-Justice or Senior Puisne judge to whom it is directed, an Administrator of the Government specially commissioned. This case happened on the departure of Sir Henry Loch from the colony in March 1889, when Sir William Robinson, by virtue of a special commission dated 13th December 1888, assumed office as Administrator of the Government, the commission to the Chief-Justice being suspended.<sup>3</sup>

4. Finally, in the event of his merely temporary absence from the colony, the Governor is empowered by the terms of the Letters-Patent constituting his office to appoint a Deputy to act for him.<sup>4</sup> But he must appoint the Lieutenant-Governor, if there be one, and the Governor's absences must only be for the purpose of visiting the Governors of neighbouring colonies; they may not exceed one month at a time, nor, in the aggregate, one month for every year's service in the colony; and notice of his intended absences must be given to the Executive Council.<sup>5</sup>

All the substitutes for the Governor have, during their tenure of office, the powers of the Governor.

<sup>1</sup> Copy in *G. G.*, 1879, April 29.

<sup>2</sup> *G. G.*, 18th April 1884.

<sup>3</sup> *G. G.*, 1889, March 9.

<sup>4</sup> Letters-patent, clause xiii. (*G. G.*, 1879, April 29).

<sup>5</sup> Instructions, clauses xv.-xvi. (*ibid.*)



## CHAPTER XXVI

### THE PARLIAMENT

THE other constituent part of the central legislature of Victoria is the Parliament. By § 1 of the Constitution Act the Legislative Council and the Legislative Assembly are established in the place of the former Legislative Council, and by colonial legislation the two houses are officially designated "The Parliament of Victoria."<sup>1</sup> It will be necessary to consider these two bodies apart, but we may first notice several points relating to the Parliament of Victoria as a whole.

In the first place, we notice that the Governor may fix the places and times for the sessions of Parliament, and may prorogue the Parliament and dissolve the Assembly as he may think fit; but there must be a session of the Parliament at least every year, with no interval of twelve calendar months.<sup>2</sup> Every member of Parliament, before taking his seat, must take the oath or make the affirmation of allegiance.<sup>3</sup> In pursuance of the power given to it by the Constitution Act, the legislature of Victoria has enacted that the Legislative Council and the Legislative Assembly, and the committees and members thereof, shall have the privileges, immunities, and powers of the British House of Commons as they existed at the time of the passing of the 18 & 19 Vic. c. 55, *i.e.* on the 16th July 1855.<sup>4</sup> The principal of such privileges were as follow—

<sup>1</sup> Constitution Act Amendment Act 1890, § 9.

<sup>2</sup> Constitution Act, §§ 28, 29.

<sup>3</sup> § 32, and Constitution Act Amendment Act 1890, § 28.

<sup>4</sup> Constitution Act Amendment Act 1890, § 10. It will be noticed that no claim is made for witnesses attending on the proceedings of the Houses.

a. *For the House—*

1. To decide on the validity of its own elections.<sup>1</sup> (This privilege is also specially guaranteed in Victoria by §§ 291-308 of the Constitution Act Amendment Act, 1890.)
2. To regulate its own internal affairs.<sup>2</sup>
3. To have access to the Crown by its Speaker.<sup>3</sup>
4. To punish for contempt, by imprisonment or expulsion.<sup>4</sup>
5. To maintain secrecy of debate.<sup>5</sup>

b. *For the individual members—*

1. Freedom from arrest in civil cases *eundo morando et redeundo*.<sup>6</sup>
2. Immunity from being summoned as witnesses and from serving on juries.<sup>7</sup>
3. Immunity from proceedings in respect of words uttered in the House.<sup>8</sup>

Moreover, for purposes of convenience, the Parliament of Victoria has bound itself to recognise as *prima facie* evidence upon any inquiry respecting its privileges the Journals of the House of Commons purporting to be printed at the order or by the printer of that House.<sup>9</sup>

The following classes of persons are ineligible as candidates for a seat in Parliament—

1. Aliens.<sup>10</sup>

<sup>1</sup> This privilege was secured by the House of Commons in the reigns of Elizabeth and James I., and at the passing of the Constitution Statute was exercised under the provisions of the 11 & 12 Vic. c. 98. It has since been abandoned.

<sup>2</sup> Asserted by Coke (4 *Inst.* 15) as the *lex et consuetudo Parliamenti*.

<sup>3</sup> See authorities quoted in May, *Parliament* (6th ed.), p. 63.

<sup>4</sup> Recognised in *Ashby v. White*, 17 Lords J. 714 (imprisonment), and constantly practised, and in *Wilkes' Case* (1764), expulsion. But the House cannot create a permanent disability upon the expelled member. See also Victorian cases, *In re Dill*, 2 W. and W. (L.) 171, and *Speaker v. Glass*, L. R., 3. P. C., 560.

<sup>5</sup> This privilege has been practically abandoned since the end of the last century.

<sup>6</sup> Recognised (inter alia) by 10 Geo. III. 50. The privilege does not, however, prohibit any process which does not involve personal arrest, and it does not extend to protect members from deliberate contempt of the superior courts (cf. *Long Wellesley's Case*, 1831). The period of *eundo, morando, et redeundo* is generally taken to cover forty days before and after each session.

<sup>7</sup> The first of these privileges is rarely exercised, the second is recognised by the 6 Geo. IV. c. 50.

<sup>8</sup> This privilege is guaranteed by a long series of precedents from *Hazey's Case* (1 Hen. IV.) down to the Bill of Rights (art. ix.)

<sup>9</sup> Constitution Act Amendment Act 1890, § 11. It should be noticed that in Victoria members of Parliament are subject to one special restriction. If they accept a non-responsible office of profit under the Crown (except that of Judge of the Supreme Court or Agent-General) whilst in Parliament, or within six months after leaving it, they are subject to a fine of £50 for every week that they hold the office. (Constitution Act Amendment Act 1890, § 25.)

<sup>10</sup> Constitution Act Amendment Act 1890, §§ 35 and 124.

2. Women<sup>1</sup> (1 for the Assembly).
3. Minors (under 30 years for the Council, under 21 for the Assembly).<sup>2</sup>
4. Judges of any court in Victoria.<sup>3</sup>
5. Ministers of religion of any denomination.<sup>4</sup>
6. Government contractors.<sup>5</sup>
7. Uncertificated bankrupts or insolvents.<sup>6</sup>
8. Holders of offices of profit under the Crown (except Ministers specially rendered eligible).<sup>7</sup>
9. Persons who have been attainted of treason, or convicted of felony or infamous offence in the British dominions.<sup>8</sup>

Moreover a member vacates his seat if he—

1. Absents himself without permission of the House for a whole session.<sup>9</sup>
2. Takes any oath or declaration of allegiance or adherence to a foreign power, or becomes a subject of a foreign state.<sup>10</sup>
3. Becomes bankrupt, or insolvent, or a public defaulter.<sup>11</sup>
4. Is attainted of treason or convicted of felony or any infamous crime.<sup>12</sup>
5. Becomes *non compos mentis*.<sup>13</sup>
6. Enters into a government contract.<sup>14</sup>
7. Resigns by writing addressed to the Governor (for the Council), or the Speaker (for the Assembly).<sup>15</sup>

In the methods of their elections the Council and the Assembly differ a good deal, but as the outlines of the scheme are the same in both cases, it is possible, in what does not profess to be a manual of practice, to treat them together.

The constituencies of the Council are arranged in "provinces" and those of the Assembly in "districts."<sup>16</sup> There are fourteen electoral provinces and eighty-four electoral districts.<sup>17</sup> Both provinces and districts are subdivided into "divisions."<sup>18</sup> There

<sup>1</sup> Constitution Act Amendment Act 1890, § 35 (Council). There appears to be no statutory prohibition of women candidates in the case of the Assembly.

<sup>2</sup> *Ibid.* §§ 35 and 124.

<sup>3</sup> *Ibid.* § 26 (Council). Constitution Act, § 11 (Assembly), where, however, the restriction only extends to judges holding during good behaviour.

<sup>4</sup> *Ibid.* § 35. Constitution Act, § 11. On the 14th of August 1877 it was resolved by the Legislative Assembly that a minister of religion publicly evidencing his withdrawal from ministerial functions prior to his election to the Assembly is not disqualified by § 11 of the Constitution Act (*V. and P. Leg. Assembly*, 14th August 1877). <sup>5</sup> *Ibid.* § 18. <sup>6</sup> *Ibid.* §§ 25 and 125.

<sup>7</sup> *Ibid.* § 12. This disqualification does not exclude persons occasionally employed in the naval and military services of Victoria (Defences and Discipline Act 1890, § 52).

<sup>8</sup> Constitution Act, § 11. Constitution Act Amendment Act 1890, § 35.

<sup>9</sup> Constitution Act, § 24. <sup>10</sup> *Ibid.* <sup>11</sup> *Ibid.* <sup>12</sup> *Ibid.* <sup>13</sup> *Ibid.*

<sup>14</sup> Constitution Act Amendment Act 1890, § 19.

<sup>15</sup> Constitution Act, §§ 8 and 23.

<sup>16</sup> Constitution Act Amendment Act 1890, §§ 30 and 122.

<sup>17</sup> *Ibid.* § 30, and Sched. 17.

<sup>18</sup> *Ibid.* Sched. 3 and 17.

is an electoral registrar (with deputies where necessary) for each division,<sup>1</sup> paid by salary,<sup>2</sup> whose duties are to keep and publish rolls of the persons claiming to be entitled to vote for their respective divisions, and to issue to them certificates of the fact (known as "elector's rights") upon payment of a small fee.<sup>3</sup> Before issuing such certificates, the registrar must put to the applicant a series of questions with respect to his title to a vote, and the answers to these questions are signed by the applicant on the counterfoil of the certificate, any wilfully false answer constituting perjury.<sup>4</sup> Any right issued for one division of a province or district may be transferred to another division of the same province or district upon satisfactory proof of qualification,<sup>5</sup> and defaced rights may be reissued.<sup>6</sup> No elector's right will be issued to an inmate of an elementary or charitable institution.<sup>7</sup> On the 1st of December in each year the registrar prepares an electoral list for his division, and on the 1st of June a supplementary list containing the names of claimants whose rights have been issued since the last publication of the electoral rolls.<sup>8</sup> Within a limited period from these respective dates he transmits printed copies to the clerk of the revision court for his division, and advertises the roll for inspection.<sup>9</sup>

Objections to the claims are sent to the registrar and the claimants in question within a fortnight<sup>10</sup> after the publication of the rolls, and are by the registrar forwarded in lists to the clerk of the revision court. The registrar is bound to accept the answers of the claimants applying for elector's rights, but he may note them as "objected to" in the lists sent to the revision court.<sup>11</sup>

The revision court for a division is the court of petty sessions usually holden nearest the electoral registrar's office, if such court be within the division, and must consist of two justices or a police magistrate in the case of the Council, and a county court judge or a police magistrate for the Assembly.<sup>12</sup>

<sup>1</sup> Constitution Act Amendment Act 1890, §§ 53 and 136.

<sup>2</sup> *Ibid.* §§ 55 and 138.

<sup>3</sup> *Ibid.* §§ 62 and 145.

<sup>4</sup> *Ibid.* §§ 63 and 146. (The punishment in case of the Council is limited to imprisonment for six months.)

<sup>5</sup> *Ibid.* §§ 64-69, and 147-152.

<sup>6</sup> *Ibid.* §§ 71-73, 154-156. Fresh elector's rights are issued every three years (§§ 101 and 193).

<sup>7</sup> *Ibid.* § 59.

<sup>8</sup> *Ibid.* §§ 76, 77, 159, 160.

<sup>9</sup> *Ibid.* §§ 79, 162. (The period for the Council is twenty-one days, for the Assembly thirty-three.)

<sup>10</sup> Eighteen days for the Assembly, *ibid.* § 164.

<sup>11</sup> *Ibid.* § 81.

<sup>12</sup> *Ibid.* §§ 86, 175.

The court in the former instance sits on the fourteenth days after the latest dates for sending in objections, viz. on the 18th January and the 18th July,<sup>1</sup> and in the months of February and August in the latter.<sup>2</sup> It may hear evidence, and may strike out or insert names.<sup>3</sup> The list as certified by the court becomes the electoral roll for the division.<sup>4</sup> It includes, not only the list of elector's rights issued by the registrar, but also the list of municipal ratepayers within the division, furnished by the clerk of the municipal district or districts within which the division lies, subject to objection and revision as in the case of the list of elector's rights.<sup>5</sup>

Prior to any election the Governor in Council appoints a returning officer for each division of a province or district, and the returning officer and his deputies are incapable of being candidates for the constituency to which they are appointed, at least until fourteen days after resigning their offices.<sup>6</sup> The Governor in Council also appoints one polling-place for each division, or more, if it is certified by the returning officer and any police magistrate or superintendent acting in the locality that more are necessary.<sup>7</sup>

The writs for the election of members of the Council are issued by the President,<sup>8</sup> or in his absence or incapacity by the Governor.<sup>9</sup> Writs for general elections to the Assembly are issued by the Governor<sup>10</sup> within seven days from the dissolution of the preceding Assembly.<sup>11</sup> Writs for bye-elections are issued by the Speaker.<sup>12</sup>

Every writ for the election of a member of Parliament contains the following particulars—

1. The number of members to be elected, and the constituency for which they are to serve.<sup>13</sup>
2. The day before which nominations must be sent in to the returning

<sup>1</sup> Constitution Act Amendment Act 1890, § 86.

<sup>2</sup> *Ibid.* § 175.

<sup>3</sup> *Ibid.* §§ 87-94, 176-183.

<sup>4</sup> *Ibid.* §§ 95-97, 184-186.

<sup>5</sup> *Ibid.* §§ 104-108, 168-174. The ratepayers' list is included because they are entitled to the franchise under §§ 43 and 135.

<sup>6</sup> *Ibid.* §§ 204, 205.

<sup>7</sup> *Ibid.* § 207.

<sup>8</sup> *Ibid.* § 208. Formerly by the Governor. The change was made in 1868 (32 Vic. No. 334, § 2).

<sup>9</sup> *Ibid.* § 208.

<sup>10</sup> *Ibid.* §§ 209, 210.

<sup>11</sup> *Ibid.* § 211.

<sup>12</sup> *Ibid.* § 210. The Speaker must give two clear days' notice to the (Chief Secretary), who must forthwith publish the notice in the *Government Gazette* (§ 215).

<sup>13</sup> See form in Sched. xxx., xxxi.

- officer.<sup>1</sup> (For the Council this must be not less than 7 nor more than 14 clear days,<sup>2</sup> and for the Assembly not less than 4 nor more than 7 clear days<sup>3</sup> from the issue of the writ.)
3. The day for the polling, if required.<sup>4</sup> (For the Council not less than 10 nor more than 14,<sup>5</sup> for the Assembly not less than 4 nor more than 7<sup>6</sup> clear days from the day on which nominations must close. In the case of a general election, all elections must take place on the same day.<sup>7</sup>)
  4. The polling-places appointed.<sup>8</sup>
  5. The day for the return of the writ to the person who issues it. (This must be within 40 days of the issue.<sup>9</sup>)

On the receipt of the writ, the returning officer must endorse upon it the date of its receipt,<sup>10</sup> and publish its purport and the details above enumerated in the newspapers.<sup>11</sup> He must also announce a place at which he will be prepared to receive nomination papers and deposits.<sup>12</sup> He must also appoint a substitute to act for him in case he becomes incapacitated,<sup>13</sup> and, as the nominations come in, he must post daily the names and descriptions of candidates nominated.<sup>14</sup>

Candidates must be nominated by a written paper in statutory form, signed by at least ten electors, and containing the names and descriptions of the candidates, who must testify by their signatures to the acceptance of the nomination.<sup>15</sup> Each nomination must be accompanied by a deposit of £100 (in case of an election to the Council) or of £50 (in the case of an election to the Assembly), and, in the former case, also by a declaration of the candidate's property qualification.<sup>16</sup> If the candidate at a contested election does not obtain one-fifth of the votes of the lowest successful candidate, he forfeits his deposit towards the expenses of the election.<sup>17</sup> But if he is successful, either with or without opposition,<sup>18</sup> or if he obtains one-fifth of the votes of the lowest successful candidate,<sup>19</sup> or if he retires, with the consent of seven of his nominators, in a formal way, two clear days at least before the day fixed for the polling,<sup>20</sup> his deposit is returned to him.

<sup>1</sup> §§ 212, 216.<sup>2</sup> § 213.<sup>3</sup> § 214.<sup>4</sup> § 216.<sup>5</sup> § 213.<sup>6</sup> § 214.<sup>7</sup> § 214. "Elections" probably means "pollings, where pollings are necessary."<sup>8</sup> § 216.<sup>9</sup> §§ 208, 216.<sup>10</sup> § 217.<sup>11</sup> *Ibid.*<sup>12</sup> *Ibid.*<sup>13</sup> § 218.<sup>14</sup> § 219.<sup>15</sup> § 220.<sup>16</sup> § 221.<sup>17</sup> § 222.<sup>18</sup> *Ibid.*<sup>19</sup> *Ibid.*<sup>20</sup> *Ibid.* and § 227.

If, when the time for sending in nominations has expired, the number of candidates nominated does not exceed the number of vacancies, the returning officer declares the nominated candidates duly elected.<sup>1</sup> But if there is a contest, he prepares for a poll by hiring or appropriating booths,<sup>2</sup> and appointing deputies.<sup>3</sup> The poll is taken by ballot, with due precautions for secrecy.<sup>4</sup> Each candidate may appoint a scrutineer to protect his interests,<sup>5</sup> but, with this exception, no persons are allowed to be present during the polling except the returning officer or his deputy, the poll clerk appointed by him, and not more than six persons actually engaged in voting.<sup>6</sup> The poll lasts from 8 A.M. to 5 P.M. of the same day, except in the metropolitan and suburban area, where, on a poll for the Assembly, the hours are from 8 A.M. to 7 P.M.<sup>7</sup>

Two classes of voters exist: those who have and those who have not "elector's rights."<sup>8</sup> The former class must produce their "rights," and prove that their names are on the electoral roll of the division; for the latter the second condition is sufficient.<sup>9</sup> Certain questions may be put to the claimants by the returning officer, with the object of ascertaining their identity, and the continuance of their qualification,<sup>10</sup> and every voter may be called upon to make a declaration against bribery.<sup>11</sup> No person may vote in respect of a residential qualification who has not resided in Victoria for at least six months of the twelve preceding the election.<sup>12</sup>

Each elector has as many votes as there are vacancies, but not more than one vote can be given by any elector for any one candidate.<sup>13</sup> The ballot papers contain the names of all the candidates, and the electors strike out the names of those for whom they do not wish to vote. If more names are left than there are vacancies, the paper is altogether void.<sup>14</sup> Duplicate votes, and votes the legality of which the returning officer suspects, are reserved for future examination.<sup>15</sup> The

<sup>1</sup> Constitution Act Amendment Act 1890, § 224.

<sup>2</sup> § 228. The returning officer may appropriate, upon due notice, the use for the polling day of any schoolroom built or supported wholly or partially by public funds or perpetual endowment (§ 229).

<sup>4</sup> § 230.

<sup>5</sup> § 235.

<sup>3</sup> §§ 231-234.

<sup>6</sup> § 237.

<sup>7</sup> § 240.

<sup>8</sup> § 241.

<sup>9</sup> §§ 241, 242.

<sup>10</sup> § 244.

<sup>11</sup> § 249.

<sup>12</sup> § 241.

<sup>13</sup> § 254.

<sup>14</sup> § 253, 254.

<sup>15</sup> §§ 255, 256.

returning officer votes, in accordance with their directions, for blind or illiterate electors.<sup>1</sup>

Immediately upon the close of the poll, the officer in charge of each polling-place counts the votes in the presence of the scrutineers and poll clerk, and then transmits votes, documents, and results in a sealed parcel to the returning officer of the division,<sup>2</sup> who, adding in the results of the polling station at which he has personally presided, declares the state of the poll, giving his casting vote where necessary. He then forwards the return endorsed on the writ to the authority issuing it.<sup>3</sup> He also forwards to the Clerk of the Council or Assembly (as the case may be) all the papers of the election, which are then kept intact for two years, unless required as evidence, when they are accepted as what they profess to be in any court of justice.<sup>4</sup> All officials engaged in the conduct of elections are liable to substantial penalties for neglect or misconduct.<sup>5</sup> On the other hand, they are remunerated for their services.<sup>6</sup>

The offences connected with the conduct of elections (other than the negligence or misconduct of the officials) are five:—bribery, treating, undue influence, wearing of badges, wagers on results.<sup>7</sup> These offences have different consequences.

1. *Bribery.* The following acts constitute bribery:—

- i. Making, promising, or procuring a gift or loan to an elector or other person to influence or as a reward for a vote.
- ii. Disposing or promising to dispose of a place or office with a similar object or motive.
- iii. Accepting such inducement and endeavouring to act in pursuance of it.
- iv. Paying money knowingly to be used for such purpose, or in repayment of money expended for such purpose.
- v. Acceptance by elector of money or office given to influence his vote, or by another person of money or valuable consideration given to influence the vote of an elector.
- vi. Payment by a candidate or agent of the hire of any conveyance for the purpose of conveying electors to or from the poll.

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<sup>1</sup> § 257. The provision for illiterate voters only applies to persons claiming as ratepayers.

<sup>2</sup> §§ 260-262.

<sup>3</sup> §§ 263, 264.

<sup>4</sup> § 266.

<sup>5</sup> §§ 197, 200, 273.

<sup>6</sup> §§ 138, 199.

<sup>7</sup> In the earlier stages of the proceedings there are various other offences in connection with false declarations. (Cf. §§ 63, 66, 73, 103, 146, 149, 156, 246.)



Any person committing bribery is guilty of and punishable for a misdemeanour, and is incapable of voting at the election in respect of which the offence was committed.<sup>1</sup>

2. *Treating.* This is the offence of providing "meat, drink, entertainment, or provisions" for the purpose of influencing an election, or the acceptance thereof with that view. The person who provides the means of corruption is guilty of a misdemeanour and is rendered incapable of voting at the election, the person accepting is disqualified from voting merely.<sup>2</sup>
3. *Undue influence* consists of the application of threats or duress for the purpose of influencing a vote. The person guilty of the offence has committed a misdemeanour, and is liable to fine and imprisonment.<sup>3</sup>
4. *Wearing of badges.* No candidate before, during, or after an election may wear badges or provide them for the inhabitants of his constituency, upon penalty of a fine of £10 for each offence.<sup>4</sup>
5. *Wagers on results.* Any person making a wager upon the result of a parliamentary election is guilty of an illegal act, and is liable to a penalty not exceeding £20.<sup>5</sup>

In addition to these penalties, any candidate declared by a parliamentary election committee to have been guilty of bribery, treating, or undue influence is rendered incapable of being elected for a province during the five years following the declaration of the election, or for a district till the next general election.<sup>6</sup>

The validity of elections is decided upon by the "Committee of Elections and Qualifications" of the House to which the election refers. This committee is appointed at the commencement of each session by the President or Speaker, subject to the approval of the House, and consists of seven members willing to serve.<sup>7</sup> In ordinary circumstances the committee

<sup>1</sup> Constitution Act Amendment Act 1890, §§ 275-277. It is also provided (§ 282) that no contracts for loans or work or goods for the carrying on of an election can be enforced.

<sup>2</sup> §§ 278, 279.

<sup>3</sup> § 280. Moreover the mere carrying of an offensive weapon at election time by a person not duly authorised creates a liability to a penalty not exceeding £20. The offender may be apprehended and imprisoned till he can be brought before a justice (§ 285).

<sup>4</sup> § 281.

<sup>5</sup> § 284. The punishment for election offences in Victoria does not appear to err on the side of severity.

<sup>6</sup> § 283. A candidate is responsible for the acts of his authorised agents, unless it be *proved* that they were committed "without his knowledge, power, or assent" (§ 302). For election offences see also Crimes Act 1890, §§ 294-296.

<sup>7</sup> §§ 291, 292. Four members must be present at each sitting of the committee (§ 296).

continues till the end of the session,<sup>1</sup> and matters come before it by petition presented by an elector or candidate of the constituency to the President or Speaker within a limited period, and by them referred to the committee.<sup>2</sup> The committee may confirm or alter a return, and deal with any matter touching the conduct of elections or the qualification of candidates, but it must not inquire into the correctness of any electoral roll.<sup>3</sup> It may report any resolution to the House, and the House may thereupon take such action as it sees fit.<sup>4</sup> Costs may be awarded to and against the petitioners,<sup>5</sup> and security for them must be given by the petitioners.<sup>6</sup> The committee sits as an open court, unless it desires, for special reasons, to deliberate in private.<sup>7</sup>

With regard to the publication of parliamentary reports, an important rule has been in force ever since the year 1850.<sup>8</sup> It is sufficient for a defendant in any proceeding brought on account of matter published in any such report to produce a verified certificate from the President or Speaker or Clerk of either House to the effect that the report was published under the authority of Parliament or a committee thereof, and thereupon the defendant is entitled to a stay of proceedings.<sup>9</sup> Moreover, in any proceeding caused by the publication of an extract from or abstract of such report, the defendant may produce the report and prove that he published *bona fide* and without malice, and he is thereupon entitled to a verdict of not guilty.<sup>10</sup>

Having examined the constitution of Parliament and the privileges of its members, we have to see what are its legislative powers and duties as a body.

The general power of legislation is conferred upon "Her Majesty, by and with the Advice and Consent of the said Council and Assembly,"<sup>11</sup> by the first section of the Constitution Act. The power is given in very wide terms—"to make Laws in and

<sup>1</sup> Constitution Act Amendment Act 1890, § 293.

<sup>2</sup> §§ 301, 302.

<sup>3</sup> §§ 297, 299.

<sup>4</sup> § 300.

<sup>5</sup> §§ 307, 308.

<sup>6</sup> § 304.

<sup>7</sup> § 296.

<sup>8</sup> § 13 Vic. No. 16 (N. S. W.)

<sup>9</sup> § 343.

<sup>10</sup> § 345.

<sup>11</sup> It will be remembered that by the former constitutions (5 & 6 Vic. c. 76, § 29, and 13 & 14 Vic. c. 59, § 14) the power of legislation was conferred on the Governor, not the Crown. It would seem that the new formula, while accentuating the delegatory character of the Governor, really creates much wider powers of legislation, by enabling the full scope of the prerogative to be exercised in conjunction with the colonial legislature.

for Victoria, in all Cases whatsoever." Sweeping, however, as is the grant, and apparently simple its terms, it is not entirely free from ambiguity. It is unlikely that the legislature of Victoria should attempt to make laws elsewhere than *in* Victoria (though as a matter of fact the Crown's assent to Victorian legislation is often given in England). But what are laws *for* Victoria? That is a question which may arise at any moment, the decision being virtually left to the Crown, by the fact of its being made an essential part to all legislation.

Besides this general power, however, certain special powers are expressly conferred on the Victorian legislature. They may be enumerated thus:—

1. To alter or repeal the provisions of the Constitution Act, subject, however, to the conditions imposed by the next power until these have been repealed by the legislature itself. (18 & 19 Vic. c. 55, § 4.)
2. To repeal, alter, or vary the provisions of the Constitution Act. But a bill to alter the constitution of the Council or Assembly or the provisions of Schedule D (salaries, pensions, and grants) must not be presented to the Governor unless the second and third readings have been passed by an absolute majority of the members of the Council and Assembly respectively. (Constitution Act, § 60.)
3. To alter the qualifications of electors and members of the legislature, and to establish and vary electoral provinces or districts, to appoint, alter, or increase the members for any constituency, to increase the whole numbers of the Houses, to alter and regulate the appointment of returning officers, and to make provision for the holding of elections. (Constitution Act, § 61.)
4. To impose any customs duties, except that differential rates may not be levied. (Constitution Act, § 43.)<sup>1</sup>
5. To make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown in the colony, and of all mines and minerals therein. (Constitution Act, § 54.)<sup>2</sup>

The power of amending the constitution has been freely exercised, but the somewhat inconsistent provisions of § 4 of the Constitution Statute and §§ 60 and 61 of the Constitution Act have given rise, as might have been expected, to some little difficulty. The two points upon which doubts have arisen are the necessity of reserving amending bills for

<sup>1</sup> This power has been slightly modified by the 36 Vic. c. 32. (Cf. *ante*, p. 232.)

<sup>2</sup> Two other powers are expressly conferred upon the legislature by § 2 of the 18 & 19 Vic. c. 55 and § 55 of the Constitution Act respectively, but these are really executive not legislative powers.

the royal assent, and the necessity for absolute majorities in the second and third readings. It will be noticed that both necessities apply only to the cases contemplated by § 60 of the Constitution Act (which is still unrepealed), but the cases enumerated in § 61 appear not altogether distinguishable from them in certain instances. The Instructions of the Governor do not direct him to reserve constitutional bills, unless they specially affect the royal prerogative, but, of course, it is within his discretion to reserve any bill whatsoever. On the other hand, the conditions imposed by § 60 are, by the Constitution Statute, impliedly made repealable by the Victorian legislature in the ordinary way.

If we look at the practice of the legislature we shall see that there has been, apparently, a good deal of doubt with respect to the applicability of the restrictions imposed by the 60th section of the Constitution Act. In the year 1857 was passed the statute<sup>1</sup> which removed the necessity for the property qualification of members of the Assembly. The bill only passed on its second reading in the Assembly by 28 votes against 21.<sup>2</sup> As the full number of members was then 60, it is clear that the bill was not deemed to fall within the provisions of § 60 as an alteration in the constitution of the Lower House. In the following year, a bill was introduced to shorten the duration of the Assembly. No record of the divisions on its second and third readings in the Assembly survives,<sup>3</sup> but, in the Council, the second and third readings passed by absolute majorities, the fact being noted at the request of the President.<sup>4</sup> But the bill never became law, the royal assent being withheld by the Governor.<sup>5</sup> In the same year, the Electoral Districts Amendment Bill was passed on its second reading by an absolute majority of the Assembly,<sup>6</sup> but there is no record of the voting on its third reading,<sup>7</sup> and the bill fell through. In the year 1864, the Pensions Bill, which affected the provisions of schedule D, passed its second

<sup>1</sup> 21 Vic. No. 12.

<sup>2</sup> Cf. *V. and P. (L. A.)*, 1856-7, Jan. 7.

<sup>3</sup> Bare fact of passing noted in *V. and P. (L. A.)*, 1857-8, Jan. 5 and 29, and cf. Hansard, sub dates.

<sup>4</sup> *V. and P. (L. C.)*, 1858, Feb. 9.

<sup>5</sup> *V. and P. (L. A.)*, 1858, June 4.

<sup>6</sup> *Ibid.* April 14 (37-5).

<sup>7</sup> *Ibid.* April 17 (and Hansard).

and third readings in the Assembly,<sup>1</sup> and its second reading in the Council, by absolute majorities,<sup>2</sup> though there is no record of the vote on the third reading in the Council,<sup>3</sup> and the bill was reserved for the royal assent. In the same year, the Constitution Laws Consolidation Bill is said<sup>4</sup> to have dropped on the second reading in the Assembly because an absolute majority was not obtained. During the progress of the Electoral Act 1865<sup>5</sup> no special records of absolute majorities were made, and the bill was not reserved for the royal assent, although it rearranged the constituencies for the Upper House, but the passing of the State Aid to Religion Abolition Bill<sup>6</sup> in 1871 was carefully made subservient to the requirements of the statute, being passed by four absolute majorities,<sup>7</sup> and reserved for the royal assent. Apparently no special precautions were taken with regard to the Electoral Act Amendment Bill of 1876,<sup>8</sup> which passed through both houses in the ordinary way,<sup>9</sup> and was not reserved for the royal assent, although it substantially altered both the number of members of and the constituencies for the Assembly. But the Reform Act of 1881,<sup>10</sup> which practically did for the Council what the Electoral Act of 1876 had done for the Assembly, was passed with due observance of the formalities of the 60th section of the Constitution Act.<sup>11</sup> And when, in consequence of a delay in the preparation of electoral rolls, a temporary provision, which incidentally lengthened the tenure of certain seats in the Council, was made by a subsequent statute<sup>12</sup> passed in the ordinary way, a third Act<sup>13</sup> was passed, conforming to the requirements of § 60,<sup>14</sup> to validate the proceedings. On the other hand, the three electoral bills of the year 1888 passed into law<sup>15</sup> without the observance of special formalities, although one of them<sup>16</sup>

<sup>1</sup> *V. and P. (L. A.)*, 1864, April 28.    <sup>2</sup> *V. and P. (L. C.)*, 1864, May 10.

<sup>3</sup> *Ibid.* May 20.

<sup>4</sup> *V. and P. (L. A.)*, 1864, May 23, and summary of proceedings on bills (also Hansard).    <sup>5</sup> 29 Vic. No. 279.    <sup>6</sup> 34 Vic. No. 391.

<sup>7</sup> *V. and P.*, 1870, Sess. i. (L. A.) 15th and 21st June, (L. C.) 5th and 6th July.    <sup>8</sup> 40 Vic. No. 548.

<sup>9</sup> *V. and P.*, 1876, (L. A.) 5th Sept. and 17th Oct., (L. C.) 26th and 31st Oct.    <sup>10</sup> 45 Vic. No. 702.

<sup>11</sup> *V. and P.*, 1881, (L. A.) 3d March, (L. C.) 3d and 11th of May.

<sup>12</sup> 45 Vic. No. 720.

<sup>13</sup> 46 Vic. No. 745.

<sup>14</sup> *V. and P. (L. C.)* 1882, 6th and 27th June, (L. A.) 13th July.

<sup>15</sup> As the 52 Vic. Nos. 995, 1004, and 1008 respectively.

<sup>16</sup> 52 Vic. No. 1004, § 3.

actually professed to repeal a section of the Constitution Act. It would appear, therefore, that the practice of Parliament with regard to the 60th section of the Constitution Act has not been altogether consistent.<sup>1</sup>

A few special restrictions and duties are also imposed upon the legislature. They may be enumerated thus—

1. Each House of Parliament must adopt from time to time Standing Rules and Orders for the conduct of its business, which, when approved by the Governor, become "binding and of force." But no rule affecting the communication between the Houses or the proceedings of both collectively is to have any force unless adopted by both (Const. Act, § 36). The Standing Orders at present in force for the Council were approved on the 15th December 1887, those for the Assembly at various times from 1857 to 1889, and those for the two Houses jointly in 1857 and subsequent years.
2. Each House must take into consideration all amendments in bills submitted by the Governor (Const. Act, § 36).
3. The legislature must not impose any customs duties upon goods imported for the royal forces, nor in defiance of treaty obligations (Const. Act, § 42).

We have now to deal with the two Houses of Parliament separately.

<sup>1</sup> The Act of 1864 (27 Vic. No. 189), which abolished the allowance to the Governor for the payment of his staff and travelling expenses, was reserved for the royal assent, but I have not been able to trace its passage through Parliament.

## CHAPTER XXVII

### THE LEGISLATIVE COUNCIL

THE thirty members given to the Legislative Council by the Constitution Act<sup>1</sup> were increased to forty-two in the year 1881,<sup>2</sup> and to forty-eight in the year 1888.<sup>3</sup> They are now distributed among fourteen provinces, of which six return four members each, and the remaining eight each send three.<sup>4</sup> Each member elected upon a vacancy caused by effluxion of time holds his seat for six years.<sup>5</sup> Members elected to fill extraordinary vacancies hold for the unexpired terms of their predecessors.<sup>6</sup>

The Legislative Council can never be dissolved, but its members retire in rotation on the expiry of their tenures. Periodical elections are held in every province in each second year, at which the oldest member retires, and, in addition, in the provinces which send four members, a periodical election is held every sixth year, which does not, apparently, coincide with any of the biennial elections.<sup>7</sup> All members are eligible for re-election.

To be qualified for membership of the Council a candidate must be a male of the age of thirty years, either a natural-born subject or naturalised and resident in Victoria for ten years, and must have been beneficially entitled to a freehold estate in Victoria of the clear annual value of £100 for one year "previously to" his election.<sup>8</sup> A declaration as to his property

<sup>1</sup> § 2.

<sup>2</sup> 45 Vic. No. 702.

<sup>3</sup> 52 Vic. No. 995.

<sup>4</sup> Constitution Act Amendment Act 1890, §§ 30 and 32.

<sup>5</sup> § 32. The period of ten years fixed by the Constitution Act (§ 3) was altered by the Legislative Council Act 1881 (45 Vic. No. 702).

<sup>6</sup> Constitution Act Amendment Act 1890, § 34.

<sup>7</sup> § 33.

<sup>8</sup> § 35.

qualification must be made by the elected candidate before he takes his seat,<sup>1</sup> and if he parts with the property without making other provision for his qualification he forfeits his seat.<sup>2</sup>

The following persons are entitled to vote for the election of members of the Legislative Council in that electoral division on the rolls of which their names appear :—

1. The owner of a freehold estate rated in a municipal district or districts in one province at the annual value of £10.
2. The owner of a leasehold estate created originally for five years, similarly rated at the annual value of £25.
3. The occupying tenant or licensee of land similarly rated at the annual value of £25.
4. The graduate of a British University, and the matriculated student of the University of Melbourne.
5. The barrister-at-law, solicitor, or conveyancer.
6. The legally qualified medical practitioner.
7. The duly appointed minister of any Church or religious denomination.
8. The certificated schoolmaster.
9. The officer or retired officer of Her Majesty's land or sea forces.<sup>3</sup>

If resident in Victoria.

Provided that these persons are—

1. Males of the age of twenty-one years.
2. Natural-born subjects, or persons who have been naturalised for three years, and resident in Victoria for the twelve months previous to the 1st of January or July in any year.<sup>4</sup>

Joint owners, lessees, and occupiers of qualifying land may claim as many rights in respect thereof as the value will cover.<sup>5</sup> All voters except those who claim in respect of property must take out "elector's rights" in the electoral divisions in which they reside.<sup>6</sup>

The Legislative Council has a constitutional officer, the President,<sup>7</sup> who acts as chairman at all meetings of the full body, and is its recognised mouthpiece. He is elected by the Council, subject to the disallowance of the Governor, and holds office until he dies, resigns, or is removed by a vote of the Council.<sup>8</sup> As we have seen, he now issues the writs for all elections to the Council.<sup>9</sup> In the event of his absence or incapacity, the Council may appoint an Acting President to fill

<sup>1</sup> Constitution Act Amendment Act 1890, § 37.

<sup>2</sup> § 39.

<sup>3</sup> §§ 43-46 and 50.

<sup>4</sup> §§ 43 and 51.

<sup>5</sup> §§ 47 and 48.

<sup>6</sup> §§ 49 and 50.

<sup>7</sup> Constitution Act, § 6.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ante*, p. 240.



his place.<sup>1</sup> In addition to this constitutional official, the Legislative Council generally appoints other officials, such as the Chairman of Committees, and the Clerk of the Council, and others. The positions of some of these officials are regulated by statute,<sup>2</sup> but their appointment is not compulsory, though obviously desirable.

The Legislative Council cannot proceed to business unless one-third of its full list of members, exclusive of the President, are present,<sup>3</sup> but no failure of election incapacitates the House if the required *quorum* be present.<sup>4</sup>

By the Constitution Act the Legislative Council is expressly prohibited from altering any "Bill for appropriating any part of the Revenue of Victoria," or "for imposing any Duty, Rate, Tax, Rent, Return, or Impost," though it may reject such bill *in toto*.<sup>5</sup> The wording of this prohibition has given rise to much discussion, but it will be better to postpone the consideration of the subject till we deal with the financial powers of the Assembly. In all other respects the legal powers of the Council are the same as those of the Assembly. It may originate or amend bills, and its concurrence in legislation is essential. It has even one special advantage, for there is no restriction upon the number of Responsible Ministers who may occupy seats in it.<sup>6</sup> A member of the Assembly may not, of course, sit in the Council.<sup>7</sup>

<sup>1</sup> Constitution Act Amendment Act, § 42.

<sup>2</sup> §§ 348-367.

<sup>3</sup> Constitution Act, § 9.

<sup>4</sup> § 22.

<sup>5</sup> § 56.

<sup>6</sup> Cf. Constitution Act Amendment Act 1890, § 13.

<sup>7</sup> Constitution Act, § 16, and Constitution Act Amendment Act 1890, § 22.

## CHAPTER XXVIII

### THE LEGISLATIVE ASSEMBLY

THE sixty members given to the Assembly by the Constitution Act<sup>1</sup> were increased to seventy-eight in 1858,<sup>2</sup> to eighty-six in 1876,<sup>3</sup> and to ninety-five in 1888.<sup>4</sup> They are now distributed among eighty-four electoral districts,<sup>5</sup> of which eleven have two members, and the others one each.<sup>6</sup> All the districts except eight densely-populated urban constituencies are subdivided into "divisions" for polling purposes.<sup>7</sup>

Each Assembly expires by effluxion of time at the end of three years from its first meeting,<sup>8</sup> and may sooner be dissolved by the Governor.<sup>9</sup> We have seen that new writs must be issued within seven days after its expiry or dissolution.<sup>10</sup>

To be qualified for election to the Legislative Assembly, a candidate must be a natural-born subject or a person who has been naturalised for five years and resident in Victoria for two years.<sup>11</sup> He is subject to the general disqualifications for membership of Parliament,<sup>12</sup> but does not require any property qualification.<sup>13</sup> A member of the Legislative Assembly receives reimbursement of his expenses in relation to his attendance at the rate of £300 per annum.<sup>14</sup> But the receipt

<sup>1</sup> § 10.                    <sup>2</sup> 22 Vic. No. 64.                    <sup>3</sup> 40 Vic. No. 548.

<sup>4</sup> 52 Vic. No. 1008.                    <sup>5</sup> Constitution Act Amendment Act 1890, § 122.

<sup>6</sup> *Ibid.* Sched. xvii.

<sup>7</sup> *Ibid.* In these exceptions "district" and "division" are co-terminous.

<sup>8</sup> *Ibid.* § 127. The Constitution Act (§ 19) had fixed five years. The change was made in 1859 (22 Vic. No. 89).

<sup>9</sup> *Ibid.*                    <sup>10</sup> *Ante*, p. 240.                    <sup>11</sup> § 124.                    <sup>12</sup> *Ibid.*

<sup>13</sup> This is almost doubtful under the peculiar wording of § 124 of the Constitution Act Amendment Act. But there can be no doubt as to the practice.

<sup>14</sup> § 126.

of official salary abates the allowance for expenses *pro tanto*.<sup>1</sup>

The following are qualified to vote in the election of members to the Legislative Assembly :—

1. Any male of the age of twenty-one years, natural-born or naturalised, who has resided in Victoria for twelve months before his application to register (for the electoral district in which he resides).<sup>2</sup>
2. Any such person who is also owner in possession of a freehold estate of the capital value of £50, or the clear annual value of £5 (for the electoral district in which such property is situate).<sup>3</sup>
3. Any such person who is enrolled as a voting rate-payer in a municipal district (for the division of the electoral district in which his rateable property is situate).<sup>4</sup>

The Legislative Assembly has a constitutional officer, the Speaker, who is elected at the first meeting after every general election, and vacates his seat by expiry or dissolution of the Assembly, and by death, resignation, or a removing vote of the Assembly.<sup>5</sup> The Speaker is not subject to the disallowance of the Governor, but is usually presented to him on his election.<sup>6</sup> He presides at all meetings of the House,<sup>7</sup> and, as we have seen, issues the writs for bye-elections to the Assembly.<sup>8</sup> The Legislative Assembly usually also appoints other officials, such as the Chairman of Committees and the Clerk of the Assembly, as well as ministerial officials,<sup>9</sup> but these appointments are not of a constitutional character.

The Assembly cannot proceed to business unless twenty members, exclusive of the Speaker, are present, and the Speaker has a casting but no substantive vote.<sup>10</sup> As in the case of the Council, no failure in the elections invalidates the proceedings of the House if the proper *quorum* be present.<sup>11</sup> No member of the Legislative Council may, of course, sit in the Assembly.<sup>12</sup>

The Legislative Assembly is subject to one disability and one privilege alike distinguishing it from the Council. Not

<sup>1</sup> § 126. Members of Parliament are also entitled to free passes over the public railways during their tenure of seats.

<sup>2</sup> Constitution Act Amendment Act 1890, §§ 128, 129.

<sup>3</sup> § 180.

<sup>4</sup> § 185.

<sup>5</sup> Constitution Act, § 20.

<sup>6</sup> Cf. e.g., *V. and P. (L. A.)*, 9th April 1889.

<sup>7</sup> Constitution Act, § 20.

<sup>8</sup> *Ante*, p. 240.

<sup>9</sup> Cf. Constitution Act Amendment Act 1890, §§ 346-367.

<sup>10</sup> Constitution Act, § 21.

<sup>11</sup> *Ibid.* § 22.

<sup>12</sup> Constitution Act, § 16. Constitution Act Amendment Act 1890.

more than eight of the salaried officials specially exempted from the rule disqualifying Crown officials from sitting in Parliament may at any one time be members of the Assembly.<sup>1</sup> This clause was probably intended to secure to the Council at least two of the ten Responsible Ministers who may be appointed. But if this be the case, it is entirely inadequate to its object, for the Governor is not bound to have more than eight Ministers, and even if he have, only four need sit in Parliament at all.<sup>2</sup>

The peculiar privilege of the Assembly in financial matters has more than once been the subject of serious difficulty, to which, as it is essentially a legal question, it will be necessary to refer. It is hardly necessary to say that it will be treated here as a legal question merely.

By § 56 of the Constitution Act—

“All Bills for appropriating any Part of the Revenue of Victoria, and for imposing any Duty, Rate, Tax, Rent, Return, or Impost, shall originate in the Assembly, and may be rejected but not altered by the Council.”

But by § 57—

“It shall not be lawful for the Legislative Assembly to originate or pass any Vote, Resolution, or Bill, for the Appropriation of any part of the said Consolidated Revenue Fund, or of any other Duty, Rate, Tax, Rent, Return, or Impost, for any Purpose which shall not have been first recommended by a message of the Governor to the Legislative Assembly during the Session in which such Vote, Resolution, or Bill shall be passed.”

The reference to “the said Consolidated Revenue” in § 57 relates to a previous section (the 44th) which provides that all the revenues of the Crown in the colony of Victoria shall form one consolidated revenue, available for the public service of the colony. One other section is also worthy of notice—

“The Consolidated Revenue of Victoria shall be permanently charged with all the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, such Costs, Charges, and Expenses being subject, nevertheless, to be reviewed and audited in such Manner as shall be directed by any Act of the Legislature.”<sup>3</sup>

It will be observed that these sections place the parliamentary initiative both in taxation and expenditure in the

<sup>1</sup> Constitution Act Amendment Act 1890, § 13.

<sup>2</sup> §§ 13, 14.

<sup>3</sup> Constitution Act, § 45.

hands of the Assembly, subject to the proviso that its use of the initiative in the latter capacity can only be exercised on the recommendation of the executive. The action of the Council is limited to a direct approval or negative; though, doubtless, it is perfectly open to the House to explain that its negative is only applied to induce an amendment. The sections in question remained unaltered in the Constitution Bill sent to England from the colony in 1854; but it is not, of course, permissible to go behind the Act itself to ascertain the intentions of its framers. Such a course leads to endless disputes, for, after all, its framers had no authority to impose their views either on the colonial or Imperial legislatures. The real question is not What was intended? but, What was done?

The present state of the question may perhaps best be gathered from the discussion which took place in the years 1877-8.

In the year 1877 the question of the payment of members came before Parliament. The practice had been adopted by two temporary Acts,<sup>1</sup> the second of which was about to expire. Mr. Berry's Government, which was in favour of the continuance of the practice, was in a minority in the Legislative Council, which in December 1877 refused the second reading of the continuing measure.<sup>2</sup> Anticipating this event, Mr. Berry, in the Governor's name, had included a sum of £18,000 in the Appropriation Bill of the session, for the purpose of providing payment as an ordinary item of expenditure.<sup>3</sup> Thereupon the Council, on the motion of Sir Charles Sladen, "laid aside" the Appropriation Bill,<sup>4</sup> and the Government, in order to meet daily necessities, ordered the collection of the duties voted by the Assembly in the Appropriation Bill, which the Council had refused to pass, founding their action upon the alleged precedent of the House of Commons, and, with regard to the expenses of collection, upon the 45th section of the Constitution Act.<sup>5</sup> In this action the Government was supported by the opinion of its law officers, but the Supreme Court had, in a previous crisis, refused to recognise

<sup>1</sup> 34 Vic. No. 383, and 38 Vic. No. 499.

<sup>2</sup> *Votes and Proceedings of the Legislative Council*, 11th Dec. 1877.

<sup>3</sup> *Ibid.* of the Legislative Assembly, 29th Nov. 1877.

<sup>4</sup> *Ibid.* of the Legislative Council, 20th December 1877.      <sup>5</sup> *Ante*, p. 255.

the claim of the Assembly,<sup>1</sup> and the Government found it impossible to enforce its demands. Thereupon it made wholesale reductions in the civil service, and something like a crisis ensued.<sup>2</sup> On the one hand, the Assembly claimed entire control over the financial policy of the country, and denied the right of the Council to interfere with it in any way. The supporters of the Council, on the other hand, denounced the action of the Government in placing the vote on the Appropriation Bill, as an attempt to prevent a fair discussion of the principle of the payment of members, and their attempt to collect the revenue on the vote of the Assembly as generally inconsistent with constitutional principles, and especially as a breach of the 25th section of the Audit Act,<sup>3</sup> which directed the Commissioners of Audit, before countersigning any warrant for the payment of public monies, to "ascertain that the sums therein mentioned are then legally available for and applicable to the service or purpose mentioned in such instrument." Moreover, it was asserted that the institution of the Commissioners of Audit was adopted for the express purpose, amongst other things, of superseding the system of payment of monies on mere resolution which had previously prevailed.<sup>4</sup>

The matter was ultimately compromised by the withdrawal of the objectionable item from the Appropriation Bill, and by the passing of the Payment of Members Bill in its original form.<sup>5</sup> This result in itself left the question of principle undecided, but the opinion of the Imperial government, to which the matter was referred, taken in combination with the facts of the case, seems to lay down the following rules as to the legal position of the much-disputed question.

1. The Legislative Council is entitled to reject any bill, whether containing money grants or not, which comes up from the Assembly. (Constitution Act, §§ 1 and 56.)
2. The Assembly is not justified (certainly not morally, perhaps not legally) in inserting a question of principle into an ordinary administrative measure, by covering it with a money vote. (The

<sup>1</sup> *Stevenson v. The Queen*, 2 W. W. and A'B. (L.), 143.

<sup>2</sup> *V. and P. of Leg. Assembly*, 1878, ii. 957-960.

<sup>3</sup> 22 Vic. No. 86.

<sup>4</sup> See respective statements of Council and Assembly in *V. and P. of Council*, 19th Feb. 1878, and *V. and P. of Assembly*, 13th Feb. 1878.

<sup>5</sup> *V. and P. of the Council*, 28th March 1878. Cf. debate in Victorian Hansard, xxvii. pp. 2313-2332.

Assembly practically confessed this rule by withdrawing the objectionable grant from the Appropriation Bill.)

3. Public officials are not warranted in collecting taxes on the mere vote of the Legislative Assembly, nor in making payments which have not been authorised by statute. (Opinion of the Secretary of State for the Colonies, explaining the practice of the House of Commons.<sup>1</sup>)

Another somewhat important point has lately arisen with regard to the scope of the 56th section of the Constitution Act. The difference of opinion may be best illustrated by stating that there are two views, one of which holds that the words "all bills for appropriating" (revenue) "and for imposing" (taxes) confine the operation of the section to bills having for their principal object the authorisation of payments or the granting of supply, while the other maintains that legislation which merely incidentally or consequentially authorises the collection of money or the payment of officials may be dealt with as ordinary legislation by the Council. It has been said to be the difference between "a bill for appropriating," and "a bill which appropriates."<sup>2</sup> In spite of the apparently verbal character thus given to the contention, the distinction is an important one, for the adoption of the stricter view practically cuts the Council off from many useful functions. It must, however, be taken to have the weight of authority in its favour, having been upheld by a ruling of the President in the year 1885,<sup>3</sup> and supported by the Committee of Standing Orders of the Legislative Council itself.<sup>4</sup>

<sup>1</sup> Copy in *V. and P. of the Leg. Assembly*, 1878, iii. p. 667. Also *Stevenson v. The Queen (ante)*. For other information relating to the question, see *V. and P. of Leg. Assembly*, 1877-8, i. pp. 569 and 711; *ibid.* iii. 631 and 653; and *ibid.* 1878, ii. 887-972. Also *Vict. Hansard*, vols. xxvi. and xxvii. sub titt. "Appropriation Bill," "Crisis," "Payment of Members," etc.

<sup>2</sup> Hearn, *Government of England* (2d ed.), p. 619.

<sup>3</sup> *Vict. Hansard*, xlix. p. 1332; *V. and P. of Leg. Council*, 6th October 1885.

<sup>4</sup> *Vict. Hansard*, xlix. p. 1487; *V. and P. of Leg. Council*, 1885, pp. 139, 143.

## CHAPTER XXIX

### OTHER LEGISLATIVE ORGANS

It is a mistake commonly made to suppose that in England the sole organ of central legislation is the Parliament. Long before Parliament acquired its powers of legislation there existed an authority by which laws were made. This authority was the Crown, and to this day the Crown possesses all those plenary powers of legislation which it once exercised, except so far as it has been expressly deprived of them. No doubt these deprivations have been very great, and they have caused much bitterness of feeling. On the other hand, since Crown and Parliament have ceased to quarrel, the latter has conferred upon or restored to the former many legislative powers, so that the legislative power of the Crown is now considerable. And it must be remembered that the Crown has never, in England, recognised the right of the Parliament to make laws in all cases whatsoever. So that in England the legislative power of the Crown is in some cases the survival of ancient prerogative right.

The wide powers conferred upon the Victorian Parliament by the highest authority in the empire precludes the possibility of such a claim being made by any other authority in Victoria. Such powers of legislation as other authorities exercise, they exercise as deputies of the Parliament, and, if they exceed the powers given to them, their legislation may be set aside. Thus, where the Board of Land and Works, avowedly acting under the powers conferred by the Land Act 1862,<sup>1</sup> published Regulations which were in fact *ultra vires*, and then attempted to enforce them, they were, though acting in the name of the Crown,

<sup>1</sup> 25 Vic. No. 145.





enjoined by the Supreme Court to act in defiance of their own Regulations.<sup>1</sup> And where the Governor in Council framed Regulations under the Mining Statute 1865,<sup>2</sup> which the Supreme Court deemed to be in excess of the powers conferred by the statute, they were treated as null, and action taken on them was set aside.<sup>3</sup> The chief instances of such subordinate legislative authorities are the Governor in Council, Public Departments, and the Supreme Court. Less frequently legislative powers are entrusted to unincorporated officials and the judges of inferior courts.<sup>4</sup>

When we come to deal with the executive branch of the central government, we shall see that the "Governor in Council" means the Governor acting with the advice of the Executive Council or Cabinet.<sup>5</sup> In delegating powers of legislation to the Governor in Council, therefore, Parliament is, practically, delegating them to a committee of both Houses, though, as it is not essential that all members of the cabinet shall be members of Parliament, it may happen that the power is exercised by persons whom the community has not entrusted with legislative duties at all. The increasing tendency to entrust legislative powers to what is primarily an executive body, is one of the most curious features of modern parliamentary government, and indicates an appreciation of some of the drawbacks of a parliamentary system. Leaving this aspect of the question for future discussion, we may here point out one or two conspicuous examples of the practice, merely premising that the familiarity of the community with it previous to the introduction of Responsible Government may have reconciled it to the practice now that it has a totally different significance.<sup>6</sup>

A very conspicuous example of the practice occurs in the 49th section of the Constitution Act, which provides that the pensions authorised by the Act for retiring judges of the

<sup>1</sup> *Kettle v. The Queen*, 3 W. W. and A.B. (E.), p. 60.

<sup>2</sup> 29 Vic. No. 291.

<sup>3</sup> *Johnson v. Thomson*, 6 W. and W. (M.), 18.

<sup>4</sup> This is, of course, leaving local legislation out of account for the present.

<sup>5</sup> Acts Interpretation Act 1890, § 5.

<sup>6</sup> Occasionally powers of legislation are directly conferred upon the Governor by Imperial legislation, e.g. 24 & 25 Vic. c. 52, which empowers him to issue Regulations qualifying the terms of the "Passengers Act 1855" (18 & 19 Vic. c. 119). Although the expression used is "Governor" simply, it is probable that the terms of his Commission and Instructions would require the Governor to act with the advice of the Cabinet.

Supreme Court shall be granted in accordance with Regulations to be framed by the Governor and Executive Council. Later sections of the same enactment make similar provisions with regard to the pensions to Responsible Officers and the grants to religious denominations,<sup>1</sup> but the sections themselves have been since repealed.<sup>2</sup>

Still more important are the wide powers of legislation conferred on the Governor in Council by more recent enactments. To take only three instances. By the Aborigines Act 1890,<sup>3</sup> he may make regulations prescribing the place of residence of any aboriginals, and the terms upon which they may be employed, and for apportioning their earnings amongst them. He may lay down the conditions upon which aboriginals shall be entitled to a share in the parliamentary grants voted for them, may order the supply to them of the necessaries of life, and may prescribe for the care, custody, and education of their children. By the Education Act 1890, he may regulate the uses of State School buildings, the terms and appointments of members of Committees of Advice, the conditions under which scholarships and exhibitions may be granted, the secular instruction to be given in the schools, the examination and classification of teachers, and the scale of fees to be paid by parents.<sup>4</sup> By the Land Act 1890, he may make rules, regulations, and orders for the numerous purposes of the Act, and for prescribing the mode of applications under it, for providing surveys and adjustment of boundaries,<sup>5</sup> and for supervising and controlling the local committees established to ensure the destruction of vermin.<sup>6</sup> The 142d section of this last Act adds the important condition that regulations made under the section shall be signed by the Minister having charge of the Act, and shall be laid before both Houses of Parliament within fourteen sitting days from their publication. Upon their publication in the *Government Gazette*, these regulations become "valid in law as if the same were enacted in this Act, and shall be judicially noticed." In other words, they are true legislation. No element is wanting. Similar provisions are now becoming common in cases of delegated legislation such as those we have first considered.

<sup>1</sup> Constitution Act, §§ 51 and 53.

<sup>2</sup> By 28 Vic. No. 235 and 34 Vic. No. 391.

<sup>3</sup> § 6.

<sup>4</sup> § 23.

<sup>5</sup> § 142.

<sup>6</sup> § 205.

As examples of public departments entrusted with powers of legislation, it will be sufficient to take a few prominent examples, such as the Board of Land and Works, the Public Service Board, the Board of Public Health, and the Victorian Railway Commissioners.

The Board of Land and Works, constituted by the Public Works Statute 1865,<sup>1</sup> consists of not less than three nor more than seven persons, of whom one at least (the president) is a Responsible Minister of the Crown.<sup>2</sup> By the Public Works Act 1890, it has very wide powers of legislation in the matter of roads and sewers. It may make by-laws for regulating the manner in which the public shall use the roads and bridges under its control, and the nature and number of the vehicles traversing them, and the speed they may make. It may make regulations for the drainage of roads and streets into sewers, and for the dimensions, manner of construction, and management of the pipes and drains communicating with the sewers, and for the assessment and collection of sewerage rates.<sup>3</sup> Moreover, by the Land Act 1890, the Board of Land and Works is authorised to make rules and regulations for the care, protection, and management of all public parks and reserves not conveyed to or vested in trustees.<sup>4</sup> The legislation of the Board is subject to the disallowance of the Governor in Council,<sup>5</sup> but does not appear to require his sanction in the first instance.

The legislative powers of the Public Service Board were conferred upon it by the Public Service Act 1883,<sup>6</sup> and they extend to the making of regulations concerning the duties to be performed by officers in the public service, and the discipline to be enforced during such performance,<sup>7</sup> as well as to the procuring and inspection of stores for the public service.<sup>8</sup> But the legislation of the Public Service Board requires the approval of the Governor in Council.<sup>9</sup>

The Health Act 1890 confers very wide powers of legislation on the Board of Public Health, which consists of an appointed chairman and medical inspector, and seven representative members.<sup>10</sup> In addition to the general power con-

<sup>1</sup> 29 Vic. No. 289. The first appointment was under the 21 Vic. No. 31.

<sup>2</sup> Public Works Act 1890, §§ 4 and 5.

<sup>3</sup> Public Works Act 1890, § 15.

<sup>4</sup> § 136.

<sup>5</sup> Public Works Act 1890, § 12.

<sup>6</sup> 46 Vic. No. 773.

<sup>7</sup> Public Service Act 1890, § 123.

<sup>8</sup> § 139.

<sup>9</sup> § 14.

<sup>10</sup> Health Act 1890, § 7.

ferred upon it to legislate for the purposes of the Act, the Board is expressly empowered to make by-laws in the following cases :—

1. For the inspection of and enforcement of cleanliness in dairies, grazing-grounds, and other places connected with the production of milk.<sup>1</sup>
2. For the cleansing and disinfecting of streets, houses, and other places, to prevent the spread of epidemics, endemics, or contagious diseases.<sup>2</sup>
3. For the prevention of overcrowding and obstruction in public buildings, and for the prevention of fires in public buildings, common lodging-houses, licensed victuallers' premises, and boarding-houses.<sup>3</sup>
4. For the registration of plumbers and gasfitters.<sup>4</sup>

Moreover, the Board has a general power of supervision of the legislation promulgated by the local authorities under the Health Act,<sup>5</sup> and may also direct the making of such legislation by local authorities.<sup>6</sup> On the other hand, the Board's own legislation requires the approval of the Governor in Council, and it may be ordered by the Minister in charge of the Act to issue legislation upon the subject of public health in pursuance of the terms of any Act of Parliament.<sup>7</sup>

Finally, on this branch of the subject, we may notice the great powers of legislation conferred on the Victorian Railway Commissioners by the Railways Act 1890. The purposes for which the Commissioners may make by-laws are almost innumerable, but a few of the principal may be mentioned.

1. The prevention of nuisances and damage upon railway property.
2. The management of the wharves, piers, and jetties vested in the Commissioners.
3. The regulation of the duties and charges of persons not in the employ of the commissioners who are connected with the railway service.
4. The disposal of unclaimed goods.
5. The regulation of traffic on level crossings.
6. The regulation of the insurance of passengers by an Accident Insurance Company.<sup>8</sup>

No by-law made by the Commissioners has any force until confirmed by an Order of the Governor in Council.

This slight sketch will have indicated something of the extent of legislative powers delegated to public departments.

<sup>1</sup> Health Act 1890, § 29.

<sup>2</sup> § 122.

<sup>3</sup> § 233.

<sup>4</sup> § 30.

<sup>5</sup> § 33.

<sup>6</sup> § 31.

<sup>7</sup> § 28.

<sup>8</sup> Railways Act 1890, § 105.

With regard to their relationship to the Parliament, it has to be noticed that the legislation in every case but one requires the direct approval of the Cabinet, which is, practically, a parliamentary committee. In the excepted case, that of the Board of Land and Works, the reason probably is that the President of the Board is always a Cabinet Minister. But even here, as we have seen, the Cabinet can annul the legislation, if it pleases.

Inasmuch as the Supreme Court is by the terms of the constitution kept sedulously distinct from all connection with Parliament, the powers of legislation conferred upon it stand on a somewhat different footing from those exercised by Public Departments. Unfortunately, it is impossible to state these powers as concisely as would be desirable, seeing that they have been conferred at different times and in different ways.

(a). The Supreme Court,<sup>1</sup> with the concurrence of a majority of its members present at a meeting held for the purpose, may make and alter any Rules of Court for the following purposes—

1. Regulation of the sittings of the Court, and its judges in chambers.
2. Regulation of the pleading, practice, and procedure of the Court, the duties of its officers, and the fees and costs in the proceedings of the Court.<sup>2</sup>

All such rules are to be laid before Parliament within forty sitting days, and if within forty subsequent days either House address the Governor against them, the Governor *must* annul them. In the meantime, however, they are valid, unless they relate to fees, no rule relating to fees being of force until it has lain one month before Parliament and been published in the *Government Gazette*.<sup>3</sup>

(b). The Supreme Court may make rules respecting the admission and examination of, and fees payable by intending practitioners.

But every such rule must be sent to the Minister administering the Act and be by him laid before Parliament "without delay." Either House may within one month after such presentation address the Governor to disallow the rule, who, *if he shall think fit*, may accede to the request. But the

<sup>1</sup> For constitution and powers of Supreme Court, cf. *post*.

<sup>2</sup> Supreme Court Act 1890, § 23.

<sup>3</sup> *Ibid.* Under this section the rules are apparently signed by a majority of the judges, who state that the meeting at which they were made was held for the purpose (cf. *Gov. Gazette*, 7th Dec. 1888).

rule takes effect from its promulgation by the Court, except it relate to fees, when the conditions formerly mentioned apply.<sup>1</sup>

(c). The judges of the Supreme Court *may* make rules for the following purposes, viz.

1. The regulation of the duties of the Registrar of Probate and Administrations, and generally for effectuating the provisions of the Administration and Probate Act 1890, Parts I. and II.

2. The regulation of the procedure and practice of the Court in all applications under the Local Government Act 1890.<sup>2</sup>

And they *must* make such rules as from time to time appear necessary for the following purposes, viz.

The regulation of the duties of the Registrar of Probates and Administrations under Part III. of the Administration and Probate Act 1890,<sup>3</sup> and the carrying of the same into effect.

All such rules must be published in the *Government Gazette* and be laid before Parliament within ten sitting days after their promulgation.<sup>4</sup>

Finally (d), the judges of the court may make general rules and orders concerning the following matter, viz.

Application to a Court or Judge under Part IV. of the Administration and Probate Act 1890.<sup>5</sup>

All such rules and orders are to take effect from a day named therein, and must be published in the *Government Gazette* within one month from the making.<sup>6</sup>

It will be observed that none of the legislation of the Supreme Court requires the confirmation of Parliament or the sanction of a Responsible Minister. In some cases the Parliament, and in others the Cabinet have discretionary powers of repeal, but in others again there is no bar to the absolute discretion of the Court.<sup>7</sup>

It is only rarely that such powers of legislation are con-

<sup>1</sup> Supreme Court Act 1890, § 26. Under this section the rules are apparently signed only by the prothonotary, and published by the Minister, who states that he has complied with the requirements of the section (cf. *Gov. Gazette*, 27th July 1888).

<sup>2</sup> Local Government Act 1890, § 543.

<sup>3</sup> *I.e.* in Foreign Probate and Letters of Administration.

<sup>4</sup> Supreme Court Act 1890, § 27. Under this section, apparently, all the judges sign the rules (cf. *Gov. Gazette*, 3d April 1890).

<sup>5</sup> Curator of deceased persons' estates.

<sup>6</sup> Supreme Court Act 1890, § 28.

<sup>7</sup> At the last moment, Parliament has passed an Act (the 54 Vic. No. 1199) which renders this statement no longer correct. Upon the Address of either House of Parliament, the Governor in Council may now annul *any* Rule of the Supreme Court; and no Rules are to take effect until they have lain for ten sitting days on the tables of both Houses, and, a week thereafter, been published in the *Government Gazette*.

ferred on unincorporated individuals, yet there are one or two instances of the practice. For example, the Minister administering the Constitution Act Amendment Act 1890 may make rules and regulations for the direction of deputy electoral registrars in their making of returns and forwarding of lists to the electoral registrars.<sup>1</sup> And the Governor in Council may appoint any two of the judges of the Court of Insolvency, together with a law officer, to frame rules for the conduct of insolvency proceedings in and out of court.<sup>2</sup>

It is usual for writers on constitutional law to class the important enactments dealt with in this chapter under the head of administrative regulations. If by this expression it is intended to assert that great questions of principle, upon which men widely differ, are not left to be settled by this kind of legislation, the doctrine is true enough. Nevertheless it should be remembered that these duties, though performed by bodies primarily appointed for executive and judicial purposes, are truly legislative duties, and that the enactments made in pursuance of them, whether they are called "by-laws," "orders," "regulations," "rules," or "proclamations," are yet real legislation, and are perfectly distinct in character from true executive and judicial acts. They proceed by general rules, not by personal application. They are intended to affect classes and not individuals. They are not restricted within limits of locality. They are openly announced as legislative changes. Some of them have been judicially declared to have the force of Acts of Parliament.<sup>3</sup> By handing them over to other authorities, Parliament does undoubtedly abandon its exclusive legislative monopoly. And it may be that in an extension of the practice we shall ultimately find our way out of the increasing difficulties of parliamentary government.

<sup>1</sup> Constitution Act Amendment Act 1890, § 54.

<sup>2</sup> Insolvency Statute 1890, § 12. The Chief-Justice of Victoria and any two or more judges of Courts of Mines may also frame general rules for the conduct of business in Courts of Mines (Mines Act 1890, § 285).

<sup>3</sup> *In re Gair*, 10 V. L. R. (L.), 108.

## 2. EXECUTIVE

### CHAPTER XXX

#### THE EXECUTIVE COUNCIL

THE head of the executive is, of course, the Governor. It is in this capacity that he makes all appointments to the public service. It is in this capacity that he is commander-in-chief of the forces in Victoria. In this capacity he exercises the prerogative of pardon.

But as we have considered the legal position of the Governor in detail in a previous chapter, we need not repeat the facts there stated. More especially as, in the greater part of his executive functions, the Governor acts with the advice of a body whose nature we are now about to consider, the Executive Council.

Ever since Victoria became a separate colony, it has had an Executive Council. For a few years after Separation, the executive officials of the colony were, in fact, appointees of the Colonial Office in London, and it was, therefore, only natural that such important posts as those of Executive Councillors should be filled directly by the Secretary of State. As we have seen, the Lieutenant-Governor was directed in his commission to appoint an Executive Council for the colony, to assist him in the performance of his duties. But his own appointments were only temporary, being subject to confirmation by the Colonial Office.<sup>1</sup>

Owing to the studied ambiguity of the official documents, it is difficult to say what were intended to be the precise relations between the Governor and the Executive Council under

<sup>1</sup> *Ante*, p. 157.



the old system. The Governor was directed to take the advice of his Council in all cases, before acting in important matters. But, on the other hand, he was entitled to act in defiance of that advice, if he chose to take the responsibility of doing so.<sup>1</sup> Owing to the fact that members of the Executive Council were generally also members of the legislature, this authority must have been a valuable weapon in the last resort, for it was clearly intended under the old system that the powers of the executive and the legislature should not reside in the same hands. But to what extent the personal views of the Governor habitually predominated over the views of his advisers, it would be impossible for any one not personally familiar with the period to say. In the Appendix will be found an extract from the Minute Book of the Victorian Executive Council for the year 1855,<sup>2</sup> which may be usefully compared with the corresponding extract from the Minute Book of the Executive Council of Sir Richard Bourke.

But there was one very important characteristic which always marked the Executive Council in Victoria. Its members were not merely executive councillors, they were also the holders of important offices in the administration.<sup>3</sup> There was no necessary reason why this should have been so. The Crown might very well have chosen to call to the Executive Council those non-official members of the community on whom it could rely, such men, for example, as it used to appoint to the non-official nominee seats in the Legislative Council. Some of them might have been abler men, who refused to sacrifice their other prospects for official place. But, as a matter of fact, not only were officials always appointed to the Executive Council, but the appointments generally used the official title; so that if the individual afterwards resigned his office, he vacated, *ipso facto*, his seat in the Executive Council.

Thus one of the distinctive features of the Cabinet system, the union of the chief officials in the community in one body, was early introduced into Victoria. And its importance in the history of Victorian government cannot easily be overrated. A non-official Executive Council may be very disinterested

<sup>1</sup> *Ante*, p. 158.

<sup>2</sup> Cf. Appendix B.

<sup>3</sup> In the Minutes of the Executive Council prior to 1856 the names of the individual members are not recorded, only the titles of their offices. The change begins in February 1856 (Minute Book of Executive Council, *passim*).

and very ambitious of the public good, but it will not have that practicality and sense of responsibility which an official body will have. If a proposal is made in an official Council, the official whose department will be affected by it knows, almost by instinct, how it will work. He will be able to bring vividly before his colleagues the difficulties in carrying it out, or, on the other hand, he may be able to assure them confidently of its feasibility. Moreover, the power of an official Council will be infinitely greater than that of a mere senatorial body, for it is almost impossible for it to be in conflict with the rank and file of the official staff.

But, though it has these advantages, an official Council has its dangers. It may easily get out of touch with the community, it may quarrel with the legislature, it may foster corruption and incapacity. A permanent executive is always liable to these dangers, and their result is both unpopularity and inefficiency of government. The remedy which England, after much agitation and many failures, succeeded in applying to these dangers, is that feature which gives her system of government its peculiar character, and which has been applied so often in the English-speaking dependencies of the Crown. The remedy is, in fact, the responsibility of the executive to the legislature, and, through the legislature, to the community.

The difficulties which occurred in England were mainly owing to the traditional theory of the constitution, which placed the control of the executive in the hands of the Crown, unfettered by the direct action of Parliament. So long as the Crown held to this prerogative, it was impossible for Parliament to acquire any direct control over the executive, except in periods of revolution. A restoration of peace always brought a restoration of the executive to the hands of the Crown.

But at length, owing to a combination of circumstances, of which the most important was a succession of monarchs who cared little for English politics, Parliament obtained indirectly what it had failed to secure directly. The Crown put itself more and more into the hands of a few Ministers united by party ties, who held the seals of office so long as their party retained a majority in Parliament. The great offices of state were broken up, and the fragments distributed amongst supporters of the Ministry of the day, on the understanding (in

some cases) that they should be given up when the heads of the Ministry deemed it expedient to resign. Even then, Parliament could not directly unseat a Ministry. But, by withholding supplies and refusing to follow the wishes of the government, they could practically render it helpless and ridiculous. When Walpole resigned over the Chippenham election in 1742, it became clear that a Prime Minister could no longer hold office against a hostile majority in the House of Commons. For no one clung to power more desperately than Walpole.

This developement of English policy so far affected colonial administration, that in Australia, even under the old system, the chief Ministers used to sit in the legislature. But their position was anomalous. They occupied nominee seats, therefore the constituencies could not refuse to elect them. It was known that nothing short of personal delinquency could cause their removal from office. Their policy could be thwarted, as the legislature became more and more powerful, but other policy could not be substituted for it.

To change this state of affairs was the great object of the framers of the Constitution of 1855. As we have seen, they did not quite know how to set about it. In spite of the warning of the Auditor-General, who saw the real difficulty of the question, the committee which drafted the resolutions upon which the constitution was framed, insisted on vesting all the patronage of the colony in the Governor alone.<sup>1</sup> As the bill was framed, however, the section placed the whole patronage in the Executive Council,<sup>2</sup> a provision equally fatal with the other. It was not until the matter was fairly thrashed out in the House that the true way out of the difficulty was discovered; which was, to vest in the Executive Council all the patronage except the appointments to the responsible offices, and to vest these in the Governor alone. This is the course actually adopted by the Constitution Act,<sup>3</sup> and sanctioned by the Governor's Commission.<sup>4</sup> Its results are obvious. It places the whole of the government patronage at the disposal of the cabinet of the day, and places the appointing of the Cabinet in the hands of the Governor.

<sup>1</sup> *V. and P.* 1853-4, iii. p. 606.

<sup>2</sup> *Ibid.* p. 632.

<sup>3</sup> § 37.

<sup>4</sup> By virtue of the Constitution Act the patents of office run in the name of the Governor; by virtue of the Commission, the patents for the Executive Council are in the Queen's name, attested by the Governor.

These results are so important that we must consider them for a moment. And we will take the latter first.

It will readily be objected that this result leaves it legally possible for the Governor to make and unmake Cabinets at his pleasure. Technically, no doubt, this is the case. But, practically, there are serious difficulties in the way of such a course, and a statement of them will show, perhaps as clearly as can be shown, the peculiar character of the Cabinet system.

In the first place, it may be assumed that an Executive Council which did not contain members of Parliament would be practically useless. It could expend no money, carry out no policy, and it would, in effect, be a mere nullity. The amount of the Civil List guaranteed by the Constitution Act forms such a small proportion of the expenditure of the community that the public business could not go on for a year without a parliamentary vote. And it may safely be assumed also, that Parliament would not follow the lead of any but its own members.

The Governor would then be compelled to choose at least some of the members of his Cabinet from amongst the members of Parliament. Unless they undertook to serve without salary, his nominees would vacate their seats in Parliament and would require re-election.<sup>1</sup> Hereupon, one of the checks of Responsible Government would probably appear. If the appointment were not in accordance with the feeling of the country, the persons appointed would not succeed in securing re-election.

But even should they succeed in being re-elected, there would still be another check. If the views of the Ministers were not in accordance with those of the majority in Parliament, the Houses would take especial care to reject every one of their proposals, financial or legislative. Their acts would be subjected to continual and hostile criticism, and the Government would be no better off than if it had no representatives in Parliament at all. And this process would be repeated until a Cabinet of which Parliament approved was appointed.

Of course it is possible that an existing Parliament does not really represent the views of the constituencies. In such a case the Governor, at the request of his Ministers, is perfectly justified in dissolving the Assembly and awaiting the test of a

<sup>1</sup> Constitution Act Amendment Act 1890, § 19.

general election.<sup>1</sup> If the new Parliament is favourable to the views of the Governor's nominees, he and they have secured a victory. If not, the question remains as before. Practically, therefore, the verdict of Parliament settles the composition of the Cabinet.

What really happens is this. When a Ministry is defeated in Parliament or at the polls, its members tender their resignations to the Governor, whose duty it is to announce his intention of accepting them.<sup>2</sup> The outgoing Premier generally suggests to the Governor the name of the most prominent of his opponents, probably the man whose speech has resulted in the vote which has convinced the Premier of the hopelessness of his position. Thereupon the Governor "sends for" the individual suggested, and, if the latter feels himself in a position to take up the reins of government, he endeavours to form a Ministry. If he fails, he informs the Governor of the fact, and the Governor then applies to some one else. Here comes in the most delicate part of a Governor's duty. It is precisely when the claims of two or more parliamentary leaders are nearly equal, that he must decide whether he will follow the suggestions of the unsuccessful aspirants, or use his own discretion. It may seriously damage the reputation of a community to be apparently unable to find a government, and the Governor is bound to use his influence to prevent delay. At the same time, his constitutional position precludes him from giving a shadow of assistance to any party. During the momentous interval, Parliament usually adjourns.

Ultimately, some one succeeds in finding a body of followers with whom he thinks he can conduct the administration of the community, and amongst them he distributes the Cabinet offices. These may now be ten in number, and may be distributed in any way.<sup>3</sup> There need not be ten different holders of offices, but no individual may draw the salaries of two or

<sup>1</sup> This was the great doctrine settled by the precedent of 1784, when the king, at the request of Pitt, and against the vehement protests of the House of Commons, dissolved Parliament. The result abundantly justified Mr. Pitt's expectations.

<sup>2</sup> He does not actually accept the resignations at once, for then there would be vacancies in the offices, and business would be at a standstill.

<sup>3</sup> Constitution Act Amendment Act 1890, §§ 13 and 16. There is apparently no limit to the number of unsalaried offices.

more offices.<sup>1</sup> The distribution is first arranged by the proposed Ministers themselves, and then submitted to the Governor for approval. Unless the list contains the name of any one against whom very serious objections exist, or proposes a new and revolutionary arrangement, the Governor always adopts it, and proceeds to carry it into effect by appointing the persons named to their various offices.<sup>2</sup> Immediately before this he accepts the resignations of the outgoing Ministers, which have been previously tendered.<sup>3</sup> He also appoints to seats in the Executive Council such members of the new Ministry as do not already hold them.<sup>4</sup> The outgoing Ministers still nominally hold seats in the Executive Council, but they never attend its meetings, and it is, in fact, of the essence of Cabinet Government that they should not do so, except on purely formal occasions. If need be, they can be dismissed, but such an extreme measure is, practically, never resorted to.<sup>5</sup>

Now begins the testing of the new Ministry. Their seats in Parliament being vacated by their acceptance of office, they go before their constituencies, and, if their opponents see a chance, opposition candidates are run. The result of these elections usually decides the attitude of the Opposition in Parliament. But it may decline to adopt the verdict of the elections, and may succeed in seriously embarrassing the Government, even though the Ministers are returned. In such a case, the Ministry may ask for a dissolution. The principle which decides a Governor in granting or refusing such a request is the probability of success for the Ministry in the event of its being granted. This of course depends on many circumstances, the chief of which is the age of the Parliament. If the Assembly has quite recently been elected, there is, usually, no claim for a dissolution; the Ministry must resign, and another must be formed. If a dissolution is granted, the result decides absolutely the fate of the Ministry.

<sup>1</sup> § 21.

<sup>2</sup> Cf. *e.g.* *Gov. Gazette*, 18th Feb. 1886.

<sup>3</sup> Cf. *ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> The power of removal was expressly conferred on Governor Sir Henry Barkly by sign-manual of the 10th March 1859 (Original in Treasury Buildings, Melbourne). And it was publicly stated by Sir Henry Barkly in his message to the Legislative Assembly of 11th Jan. 1859, that it was the intention of the Colonial Office that Executive Councillors who had lost the confidence of the local legislature should resign (*V. and P. (L. A.)*, 11th Jan. 1858-9). See the whole process worked out in *G. G.*, 1890, 5th and 11th Nov.

We have thus seen how the apparent liberty of the Governor in choosing his Executive Council is practically limited by constitutional machinery. We have now to consider how the power of the Executive Council, in disposing of the other patronage of the Crown, is controlled.

Briefly, there are two aspects of the question, dismissal and appointment. With regard to the first, the power of the Cabinet was at one time practically omnipotent. Subject only to the odium which such a course involved, a Cabinet could dismiss at a moment's notice almost the whole executive of the colony, from the heads of departments down to the telegraph boys. All held their appointments during the pleasure of the Crown, and the pleasure of the Crown meant, in such a case, the pleasure of the Cabinet. As a matter of fact, the power of dismissal was at least once in Victoria used as a powerful weapon in a party conflict.

But the effectiveness of the weapon has been greatly diminished by alterations recently introduced. Appointments and dismissals are still made by the Executive Council, but they must follow precisely defined rules. No appointment can be made except upon the request of a permanent head of a department and upon the certificate of the Public Service Board (a "non-political" body), which, in giving its certificate, names the person entitled to the appointment by strict statutory provisions; and no official can be dismissed or punished (save for proved misconduct) except by the Public Service Board with the consent of the Executive Council.<sup>1</sup> It is these rules, and the consequences which follow from them, which make the politics of Victoria so different from those of America. In America the famous "Spoils" system makes every official, down to the bow oar of the pilot's boat, a keen partisan and a determined supporter of the Government. He knows that if his party is defeated he must lose his post, and he will strain every nerve to prevent defeat. In Victoria the holders of official positions, at least the younger members of the service, are largely indifferent to the rise and fall of Governments. One very obvious result of the fact is that the party system is dying a natural death in Victoria.

Before leaving the Executive Council, we may say a word

<sup>1</sup> Public Service Act 1890, §§ 32 and 121.

or two as to its methods of doing business. We have already discussed its legislative functions, we have now to consider it in its purely executive capacity.

It will have been observed that the Executive Council has an ideal and an actual existence. Ideally, it contains all the persons who have ever been appointed to it, except those who have died or been deprived of their seats.<sup>1</sup> In this form the Executive Council never meets. It has been suggested that it should assemble on great ceremonial occasions, such as the arrival of a new Governor, and that its ranks should be recruited from the most distinguished members of the community, irrespective of their political importance. This is the practice followed in England with the Privy Council, but the suggestion does not seem to find much favour in Victoria.

Even in its active phase, however, that of the existing Ministry, the Executive Council has two shapes, the formal and the informal. The latter, which is usually spoken of as the "Cabinet," is the real core and essence of the Government. In its private meetings at the Premier's offices no one is admitted but the actual Ministry of the day, no records of the meetings transpire, and no official notice is ever taken of the proceedings. (This was the type of meeting so distasteful to the English patriots of the seventeenth and eighteenth centuries, the meeting stigmatised as "Junto" and "Cabal," but which has proved so necessary that it has become the pivot of the Imperial system of government.) The former is the "Executive Council" proper, presided over by the Governor, and attended by the clerk, who keeps a formal record of its proceedings. Though strangers are not admitted, the records of its deliberations are frequently published, with the names of its members prefixed.<sup>2</sup> Here the decisions of the Cabinet are put into official form, appointments confirmed, resignations accepted, proceedings ordered, and notices published. It is the formal organ of the executive of the colony.

<sup>1</sup> There were, at the close of the year 1889, 74 members (Blue Book for 1889). The appointments to the Executive Council make the tenure of seats dependent on the occupant's residence in the colony. Apparently, however, this condition is not insisted on except in the case of active members.

<sup>2</sup> Cf. *e.g.* *Gov. Gazette*, 19th Feb. 1886, for numerous examples. As before pointed out, the individual names of members present, and not the titles of their offices, are now published.



It is hoped that the foregoing sketch has made clear the true position of the Cabinet in the modern English system, for it is emphatically an English system, of politics. The Cabinet, composed almost entirely of the highest officials in the administration,<sup>1</sup> wields the whole executive force of the community. Being also composed of parliamentary leaders, it controls the bent of legislation. No new departure in financial or other policy can take place without its sanction. It is, as nearly as possible, the sovereign power of the community.

On the other hand, its tenure of office is uncertain. It lives on the popular credit, and can be got rid of by a change of popular feeling. This change usually manifests itself through Parliament, but the Cabinet, should it be disposed to take the risk, may appeal from Parliament to the constituencies. If the verdict of the constituencies be against it, it must retire from administration and legislation alike. There is no further appeal.

<sup>1</sup> There is no legal objection to the appointment of non-official members, and, as a matter of fact, one or two are usually appointed by each government (cf. *Gov. Gazette*, 5th Nov. 1889, Mr. Stuart and Mr. Peacock). The practice is open to abuse.

## CHAPTER XXXI

### RESPONSIBLE MINISTERS

ALTHOUGH there appears to be no statutory authority on the subject, a "Responsible Minister" may be defined as a Crown official who is eligible for a seat in Parliament.<sup>1</sup> Owing to the very peculiar wording of the Officials in Parliament Act 1883<sup>2</sup> (adopted into the Constitution Act Amendment Act 1890), it is difficult to state exactly the law on the subject, but it is submitted that the following is an accurate summary of its provisions.

The Governor may appoint any number of persons, not exceeding ten, to offices of profit under the Crown, and these persons, notwithstanding the general rule which disqualifies Crown officials from sitting in Parliament, may be elected to either House. But they must be "responsible ministers of the Crown and members of the Executive Council, and" (*i.e.* presumably if so many are appointed) "four at least of such officers shall be members of the Council or Assembly."<sup>3</sup> The total amount available for their salaries is the annual sum of £15,500, of which £14,000 was provided by the Constitution Act,<sup>4</sup> and the remaining £1500 by the Officials in Parliament Act 1883.<sup>5</sup> But there is no statutory rule as to the mode of distribution of this sum, except that the "additional officer appointed under the Officials in Parliament Act 1883" must

<sup>1</sup> I should have been inclined to add "and is a member of the Executive Council," but as the 2d section of the Officials in Parliament Act has provided that certain persons shall be "responsible ministers of the Crown *and* members of the Executive Council," I presume there is no necessary connection between the two ideas.

<sup>2</sup> 47 Vic. No. 280.

<sup>3</sup> Constitution Act Amendment Act 1890, § 13.

<sup>4</sup> § 46.      <sup>5</sup> § 3.

receive £1500 a year.<sup>1</sup> Not more than eight salaried officials may sit at any one time in the Legislative Assembly.<sup>2</sup> Not only are the salaries of those officials specially appropriated by statute, but, up to the extent of the £14,000 provided by the Constitution Act, they must be accounted for to the Imperial Treasury.<sup>3</sup> Upon accepting salaried office, a Responsible Minister vacates his seat in Parliament,<sup>4</sup> but he is re-eligible, and a subsequent change from one office to another does not necessitate his re-election.<sup>5</sup>

The object of these peculiar provisions is undoubtedly to secure greater pliability in the distribution of offices. In theory, by the constitution of Victoria, the Cabinet offices are functional only, not organic. The holder of one office can do the work usually performed in another, and a redistribution of business can be made at any time.<sup>6</sup> Nevertheless, owing to the requirements of certain statutes, and the natural convenience attaching to traditional names, the chief offices in the administration have become stereotyped, and may be enumerated as follows.

1. THE CHIEF SECRETARY, whose office was, under the old system, when its holder was known as the "Colonial Secretary,"<sup>7</sup> the official head of the Ministry, having been specially given precedence by Royal Instructions of 11th March 1852.<sup>8</sup> Upon the introduction of Responsible Government, the change in the title was made at the wish of the framers of the Con-

<sup>1</sup> 47 Vic. No. 280, § 3. The arrangement during the Gillies-Deakin government was as follows:—

Chief Secretary . . . . .	} £2000 each
Treasurer . . . . .	
Attorney-General . . . . .	£1600
Minister of Defence . . . . .	£1500
Minister of Public Instruction . . . . .	} £1400
Minister of Justice . . . . .	
Commissioner of Trade and Customs . . . . .	
"    "    Crown Lands and Survey . . . . .	
Minister of Public Works . . . . .	
Postmaster-General . . . . .	

<sup>2</sup> Constitution Act Amendment Act 1890, § 13.

<sup>3</sup> Constitution Act, § 46.

<sup>4</sup> Constitution Act Amendment Act 1890, § 19.

<sup>5</sup> § 17.

<sup>6</sup> With this object doubtless has been adopted also the increasing practice of conferring statutory functions on "the Minister for the time being administering this Act."

<sup>7</sup> The old title is retained in the New South Wales Ministry, and it is still, apparently, officially recognised in Victoria (cf. Acts Interpretation Act 1890, § 6).

<sup>8</sup> Original in Treasury Buildings, Melbourne.

stitution,<sup>1</sup> but the official precedence of the Chief Secretary seems to have disappeared on the introduction of the title of "Premier," which, however, in spite of the attempt of Mr. Berry to elevate it into an office, remains, as in England, merely a titular distinction. The head of the Ministry invariably fills the office either of Treasurer or Chief Secretary.

Like the Home Secretary in England, the Chief Secretary comes in for all Government work which does not distinctly belong to a special department, as well as for duties specially imposed on him by name.<sup>2</sup> In the former capacity he usually undertakes the control of the business connected with the machinery of the police force, the inspection of factories and shops, the maintenance of penal establishments and gaols, the hospitals for the insane, the public libraries and museums, and the enforcement of the Health Act.<sup>3</sup> In the latter he receives and publishes the returns of the Registrar of Births, Deaths, and Marriages,<sup>4</sup> the accounts of the Commissioners of Savings Banks,<sup>5</sup> licenses places of public amusement,<sup>6</sup> and communicates the remission of a sentence to the judge who tried the case.<sup>7</sup>

2. THE TREASURER is one of the very few executive officials of the colony who have definite duties imposed on them by the constitution. In fact it may be doubted whether the business of government could be legally conducted without him. He seems to combine in his person the functions of the Treasury and Exchequer departments, which in England, though long united, have for some time been severed. By § 46 of the Constitution Act the Treasurer<sup>8</sup> is bound to issue monies to the extent of the Civil List in discharge of warrants directed to him by the Governor, and to account for the same to Her Majesty through the Commissioners of the (Imperial) Treasury,

<sup>1</sup> *V. and P.*, 1853-4, iii. 597. The official in question is also described in the same document as "the Secretary to the Government."

<sup>2</sup> Even in these cases his functions can be executed by any other Responsible Minister (Acts Interpretation Act 1890, § 6).

<sup>3</sup> Sometimes minor duties in connection with these matters are conferred on him by statute (*e.g.* Police Regulation Act 1890, § 7; Gaols Act 1890, § 22; Libraries Act 1890, § 8). Since November 1890 there has been a separate Minister of Health. Cf. *G. G.*, 5th Nov. 1890.

<sup>4</sup> Registration of Births, Deaths, and Marriages Act 1890, § 11.

<sup>5</sup> Savings Banks Act 1890, § 48.

<sup>6</sup> Theatres Act 1890, §§ 3, 4, and 6.

<sup>7</sup> Crimes Act 1890, § 541.

<sup>8</sup> The Constitution Act said "Treasury," but the misprint was corrected by 50 Vic. No. 904, § 2.

the corporate body into which the great office of Lord Treasurer has long been resolved. By § 58, no part of the revenue of Victoria arising from sources over which the legislature has control can be made issuable except in pursuance of warrants under the hand of the Governor, addressed to the Treasurer. So that although, under § 48, the office of Treasurer may be abolished, it would hardly be possible for the Government to exercise this power without making some substantial change in the financial scheme. It is, of course, quite possible that the colony may some day follow the Imperial example, and put the Treasury in commission.

Moreover, certain duties are imposed on the Treasurer by name, in colonial legislation, notably in the Audit Act. But the best way to form an idea of his position will be to sketch the history of a Government financial year.<sup>1</sup>

Early in the session the Treasurer moves, in the Legislative Assembly, resolutions for the appointment of two committees of the whole House, the Committee of Supply, and the Committee of Ways and Means. On the occasion of the first sitting of the Committee of Supply, the Treasurer produces in the name of and by message from the Governor, the Estimates of the revenue and expenditure for the forthcoming year, together with the recommendations for expenditure and taxation, in pursuance of the 57th section of the Constitution Act.<sup>2</sup> These documents taken together form the "Budget," and are generally introduced by a speech from the Treasurer, in which he explains the financial policy of the Government, and generally refers to the results of the previous year's finance. The Estimates may be amended by any subsequent estimates in the same session.

The Committee of Supply then proceeds to consider the Budget, and passes "votes" or resolutions, authorising the making of certain payments. At first these resolutions are for lump sums, well within the requirements of the various items for the year (except in the case of items fixed by statute), and are only intended to cover a period of about three months. They are reported to and confirmed by the House, and are the

<sup>1</sup> The Government financial year ends on the 30th June (Acts Interpretation Act 1890, § 13).

<sup>2</sup> The accounts for the previous year are also presented in pursuance of the Audit Act (*cf. post*, pp. 282-284).

Government's authority for payments on account. To put the Government in funds for such expenditure, the Committee of Ways and Means then resolves upon the grant to Her Majesty of a sum to cover the expenditure voted by the Committee of Supply; and the resolution, having been reported to the House, is embodied in a short "Consolidated Revenue Bill," and passed through all stages of legislation, appearing finally as a regular Act of Parliament. With the monies thus provided, the Government makes payments, in manner hereafter described, on account of the expenditure sanctioned by the Committee of Supply.

The Committee of Supply then takes into account the detailed items for the year, and, after examining them, votes them individually, deducting the amounts previously granted on account. As progress is made, the Committee of Ways and Means from time to time recommends various further grants to meet the expenditure sanctioned, and such recommendations are incorporated in Consolidated Revenue Bills and carried through all stages. Finally, the accounts for the year are passed, and included in a comprehensive Appropriation Bill, which also grants the balance of the funds necessary to meet the expenditure voted. The Appropriation Bill, like the bills making grants on account, is introduced on the formal vote of the Committee of Ways and Means.

In so far as the grants made are not already provided for by existing taxation or other sources of revenue, they have, of course, to be met by legislation. There is no general taxation Act, but duties are imposed by various statutes upon the importation of goods, the succession to the estates of deceased persons, or other objects, according to the policy of the day. With regard to Customs duties, the legislature of Victoria adopts one rather stringent precaution, making the Acts retrospective, so as to include all importations conducted since the proposal of the measure.<sup>1</sup> Between the announcement and the enactment of the measure, evasion of the Act is prohibited by Customs Regulations, which are made by the Commissioner of Customs in pursuance of a resolution of the Assembly,<sup>2</sup> and which practically enforce collection of the new

<sup>1</sup> Thus the Duties of Customs Act 1889 in most cases applied from the 31st July, though it was not passed till 4th November.

<sup>2</sup> *E.g. V. and P. (L. A.)*, 30th July 1889.

duties at once, subject to return if the legislature alters them in their passage through the houses.<sup>1</sup>

So much for the way in which revenue and expenditure are voted. Now we must consider how they are actually collected and distributed.

When the office of Auditor-General was abolished in the year 1857, a new system under the control of Commissioners was introduced.<sup>2</sup> The new scheme was itself remodelled in 1859, but the Commissioners were continued,<sup>3</sup> and in outline the scheme is now as follows.

The Commissioners of Audit, whose salaries are permanently charged upon the revenue, are appointed by the Governor in Council, and cannot be removed except upon Addresses of both Houses in the same session, or of the Legislative Assembly in two successive sessions.<sup>4</sup> They may, however, be temporarily suspended by the governor in council.<sup>5</sup> They cannot be members of parliament or of the Executive Council.<sup>6</sup>

Monies payable to the Consolidated Fund<sup>7</sup> are in the first instance received by "Collectors of Imposts" stationed at various places throughout the colony,<sup>8</sup> and by them paid over to "Receivers of Revenue" in such places as the Governor in Council shall direct, and at such intervals as may be prescribed by the Treasurer.<sup>9</sup> The Collector, in handing over the monies to the Receiver, furnishes him with a detailed statement of the items of which they are composed, and sends each month a return of his receipts to the Commissioners of Audit.<sup>10</sup> The Receiver discharges the Collectors of their payment, pays the amounts daily into a bank to the credit of "The Public Account," and forwards daily statements of the sums so paid in, together with duplicate banker's receipts, to the Treasurer.<sup>11</sup> Sums received by public officials for private persons are similarly paid into the bank, the interest accrues to the Consoli-

<sup>1</sup> For evidence as to the process above detailed, cf. 53 Vic. Nos. 1012, 1018, 1019, 1043, and 1053; *V. and P.* (L. A.), 1889, pp. 41, 59, 81, 83, 125, 128-156, 184, 187-205, 210, 213, 217-225, 226-229, 230, 233, 236-279, 281, 283, 285, 291, 294, 326-339, 342, etc.; Hansard, vols. lx.-lxii. sub titt. "Supply," "Ways and Means," etc.

<sup>2</sup> 21 Vic. No. 24.

<sup>3</sup> 22 Vic. No. 86.

<sup>4</sup> Audit Act 1890, §§ 6-8.

<sup>5</sup> § 8.

<sup>6</sup> § 7.

<sup>7</sup> It will be remembered that by the Constitution Act (§ 48) all incomings are to be paid into a Consolidated Fund. Cf. also Public Monies Act 1890, § 3.

<sup>8</sup> Audit Act 1890, § 13.

<sup>9</sup> §§ 12, 15.

<sup>10</sup> Audit Act 1890, §§ 16, 21.

<sup>11</sup> §§ 17, 19, 20.

dated Fund, and, if the sums are not claimed for three months, they are paid into a "Trust Fund" account kept in the Treasury.<sup>1</sup> After six further years' non-claim, provided that the persons entitled are not under disability, the sums become part of the Consolidated Revenue.<sup>2</sup>

The expenditure of public monies is effected through "Paymasters" in the following way. The Treasurer estimates the amount which will be payable out of each local account during the ensuing month, and prepares a warrant in official form which he signs and transmits to the Commissioners of Audit.<sup>3</sup> The latter examine the warrant, to see that the monies upon which it proposes to draw are "legally available" for the purposes to which it is proposed to devote them, and, if it is satisfactory, two of them countersign and return it to the treasurer, who submits it for the signature of the Governor.<sup>4</sup> Upon securing this final attestation, the warrant is filed in the Treasury, and becomes the official authority for the payment of the money.<sup>5</sup> The Treasurer, by order in writing, directs that the cheques of certain Paymasters named shall be honoured at any bank at which the Public Account is kept, but even this document must be countersigned by a Commissioner of Audit before the bank is entitled to act upon it.<sup>6</sup> The Paymaster, finally, must only pay such claims as are transmitted to him by the Treasurer.<sup>7</sup>

In making this distribution of public monies, the executive is only entitled to depart to a very limited extent from the appropriation made by the legislature. It may make up the deficiency in any one item in a "subdivision of the annual supplies"<sup>8</sup> by transferring to it any surplus from another item in the same subdivision, provided that the subdivision is not expressly stated to be "inalterable." But such alteration can only be effected by Order, not by warrant, and may not be employed to increase any salary or wages fixed by law.<sup>9</sup> And the sums appropriated can only be expended within the financial year for which the appropriation was made.<sup>10</sup>

Further precautions are taken, by provisions which compel bankers with whom public monies are deposited to send

<sup>1</sup> Audit Act 1890, §§ 23, 24.

<sup>2</sup> § 25.

<sup>3</sup> § 28.

<sup>4</sup> Audit Act 1890, § 29.

<sup>5</sup> §§ 29, 30.

<sup>6</sup> § 30.

<sup>7</sup> § 31.

<sup>8</sup> *I.e.* (presumably) in the Schedule to the Appropriation Act.

<sup>9</sup> Audit Act 1890, § 32.

<sup>10</sup> § 33.



daily, to the Commissioners of Audit and Treasurer respectively, a statement, known as "The Bank Sheet," showing the position of the Public Account at the bank,<sup>1</sup> and which direct the Treasurer to forward daily to the Commissioners of Audit a "Cash Sheet" showing the amounts of the statements, accounts, and receipts forwarded to him by the Receivers and Paymasters.<sup>2</sup> From all these documents the Treasurer prepares a quarterly statement of receipts and expenditure, which is published in the *Government Gazette*, and an annual statement of the Consolidated and Trust funds, which, when audited by the Commissioners, is transmitted to the Legislative Assembly.<sup>3</sup> Of late years it has become the custom for the Premier of the colony to occupy the office of Treasurer.

3. THE ATTORNEY-GENERAL acts in several distinct capacities.

- a. As *Legal Representative of the Crown*, he conducts all process in which the Crown appears as a party. A striking example of this capacity is to be found in § 388 of the Crimes Act 1890, which authorises the Attorney-General to make presentment of any person for any indictable offence, and in the 391st section of the same statute, which empowers him, in the case of any person imprisoned under committal for trial on a charge of felony or misdemeanour, to grant a certificate of *nolle prosequi* addressed to a judge or the judges of the Supreme Court, whereupon the prisoner's immediate release must be ordered.
- b. As *Legal Adviser of the Government*, the Attorney-General is bound to furnish, when called upon by the Governor, a written opinion with regard to any legal question which may arise in the conduct of the executive, such as, for example, whether the provisions of a certain statute have been complied with by a government department, whether a certain contemplated course is constitutional, or whether certain alleged offenders have brought themselves within the limits of the law. In the difficult and important matter of death sentences, it would seem that it is the function of the attorney-general to request the judge who tried the case to forward his notes of the trial to the executive, and to advise the Government upon the course to be adopted. Information as to the actual conduct of the trial is furnished by the judge, while the final decision on the matter rests with the Governor, and is communicated to the judge by the Chief Secretary.<sup>4</sup>
- c. As *Administrator of the Legal Department*, the Attorney-General is the head of the legal staff of the Government. Under his

<sup>1</sup> Audit Act 1890, § 34.

<sup>2</sup> § 35.

<sup>3</sup> §§ 48-52.

<sup>4</sup> The position of the Governor, with regard to death-sentences, cannot, however, be said to be free from doubt.

supervision are the Crown Solicitor, and the Public Prosecutors, the various officials of the Land Transfer Office, and the sheriffs. The publication of official legal documents is also in his charge, and he is deemed accountable to Parliament for the working of the legal machinery of the state.

- d. As *Adjudicator*, the Attorney-General also acts in certain special cases, as, for example, in the case of disputes between the Postmaster-General, and any depositor in the Post-Office Savings Bank,<sup>1</sup> and where, under the Insolvency Act 1890, he orders payment of the costs of a trustee or assignee out of the "Insolvency Suitors' Fund."<sup>2</sup> In these cases he appears to act rather as a judicial than an executive official.

4. THE COMMISSIONER OF CROWN LANDS AND SURVEY, who has succeeded to the old office of Surveyor-General,<sup>3</sup> and who takes over the duties of that office. To him belongs in effect the administration of the unalienated lands of the Crown. In his duties are included the survey, sale, and management of the public domain, and the carrying out of the legislation enacted with respect to it. We have seen that, in the early days of the colony, no subject was more sure to excite public interest than the matter of Crown lands. All alike were interested in their distribution, and the desire to obtain complete control over them was one of the strongest elements in local feeling. It becomes almost essential therefore to notice, in outline, the development of the policy of Responsible Government on the subject.

In the year 1857 the functions of both the Surveyor-General and the Commissioner of Public Works were transferred to the new department of the Board of Land and Works created by statute.<sup>4</sup> The Board was to consist of not less than three nor more than five members, of whom one, the "President of the Board of Land and Works," was to be a Responsible Minister, but all the others were to be permanent officials, incapable of sitting in Parliament.<sup>5</sup> To this body were also transferred the functions of the Central Road Board.<sup>6</sup> The object of this scheme was, clearly, to abolish the offices of Surveyor-General and Commissioner of Public Works, and to place the whole administration of Crown lands, together with the creation and

<sup>1</sup> Post Office Act 1890, § 84.

<sup>2</sup> Insolvency Act, § 127.

<sup>3</sup> The post of Surveyor-General has been reconstituted as a non-political office.

<sup>4</sup> 21 Vic. No. 31.

<sup>5</sup> § 1. By the 21 Vic. c. 58 provision was made for the appointment of a Vice-President.

<sup>6</sup> § 6.

management of public works, in the hands of a single Responsible minister, the President of the Board of Land and Works.<sup>1</sup> But this part of the plan seems to have fallen through very quickly. The Surveyor-General reappeared as the Commissioner of Crown Lands and Survey in December 1858, simultaneously with the reappearance of the Commissioner of Public Works.<sup>2</sup> The office of President of the Board of Land and Works was undertaken by the Commissioner of Crown Lands and Survey, a practice which has since been usually followed. In the year 1862, after the creation of the new office of Commissioner of Railways and Roads, the Governor in Council was empowered to appoint one or two Responsible Ministers to be vice-presidents of the Board,<sup>3</sup> and the practice was for some time to confer the vice-presidencies on the Commissioner of Public Works and the Minister of Railways. But latterly they have been held as unsalaried offices by members of the Cabinet holding no other posts.

Meanwhile, the policy with respect to the alienation of Crown lands had been embodied in a statute of the year 1860, which has been completely remodelled on three later occasions.

The Act of 1860, after providing for special reserves of lands for public purposes, and also of water frontage and mineral lands, divides the saleable Crown lands of the colony into two great classes of "country" and "special" lands.<sup>4</sup> The former are thrown open to sale by selection, after Government survey, in "allotments" of from 80 to 640 acres, each being divided into two equal "subdivisions." For these subdivisions private applications may be received, accompanied by a deposit of £1 an acre, and if before a fixed day there is only one applicant for an allotment, he is to be deemed the purchaser of it in fee-simple at his deposit price of £1 an acre. If there are more applicants than one, the subdivision is put up to auction, but only the applicants are allowed to bid. The successful bidder is to be allowed to purchase the other subdivision of his allotment at the same price as he pays for the first, or to rent it, at his option, at the rate of one shilling an acre, for a term specified in the proclamation throwing the land open for selection. A lessee is to have no compensation

<sup>1</sup> This was the practice adopted in the Haines Ministry of 1857-8.

<sup>2</sup> *G. G.*, 21st Dec. 1858.

<sup>3</sup> 25 Vic. No. 62, § 5, continued by 29 Vic. No. 289, § 6.

<sup>4</sup> 24 Vic. No. 117, §§ 2, 9, 12.

for improvements on his rented subdivision, but he is to be entitled to purchase the fee-simple at any time during his term, upon payment of a sum equal to the purchase-money of his purchased subdivision. If there are applicants for both subdivisions of a section, they compete together at the auction, and the highest bidder is entitled to claim his choice of one, and to purchase or rent the other without competition. But no selector is to obtain more than 640 acres of land, leased or purchased, within a year, except in the case of lands which have been open for sale twelve months. An important section provides that country lands are to be proclaimed open for selection in districts, not in isolated allotments. Moreover, when one-fourth of the lands opened by a proclamation have been selected under this process, the purchasers may use the unsold allotments as "farmers' commons" for pasturage purposes.<sup>1</sup>

"Special" lands, *i.e.* lands within certain named distances of towns, villages, sea-coasts, railways, and rivers, are to be sold by quarterly auction sales, at an upset price which is never to be less than £1 an acre for the fee-simple, and may be raised by the Governor in Council previous to a sale. The value of existing improvements is to be added to the upset price, and purchasers are not, without permission of the Board of Land and Works, to interfere with existing races, dams, or reservoirs.<sup>2</sup> Mining leases may be granted for thirty years, and licences, for one year, for any purpose except the working of gold,<sup>3</sup> and "Town Commons," for the use of the inhabitants of towns, may be proclaimed.<sup>4</sup>

The scheme of 1860 was substantially altered by the "Land Act 1862,"<sup>5</sup> which provides that ten million acres of Crown land shall be at once set aside for proclamation in agricultural areas, two millions to be kept constantly open for selection.<sup>6</sup> The competitive clauses of the Act of 1860 are replaced by provisions which give the exclusive right of purchase to the first selector,<sup>7</sup> and the minimum size of an allotment is reduced to 40 acres.<sup>8</sup> In other respects the methods of application and allotment are continued, except that the term

<sup>1</sup> 24 Vic. No. 117, §§ 14-47.

<sup>2</sup> 24 Vic. No. 117, §§ 48-59.

<sup>3</sup> §§ 62 and 63. The gold fields were then regulated by the 21 Vic. No. 32.

<sup>4</sup> § 69.

<sup>5</sup> 25 Vic. No. 145.

<sup>6</sup> 25 Vic. No. 145, § 12.

<sup>7</sup> § 17.

<sup>8</sup> § 18.

for which a lease of one subdivision may be granted on the purchase of the other is fixed at eight years, and the rent at half-a-crown an acre.<sup>1</sup> The holders of licences under the former Act are to have a pre-emptive claim to purchase the subdivision occupied by them under the licence.<sup>2</sup> An important section<sup>3</sup> provides that every selector is within one year to cultivate one acre out of every ten of his allotment, or to erect a dwelling, or a substantial fence upon the allotment. All lands not comprised in the agricultural reserve are to be open for sale by public auction at the minimum upset price of £1 an acre.<sup>4</sup>

After authorising the granting of short leases for various industrial purposes, and making elaborate provisions for the proclamations of commons, the Act of 1862 proceeds to deal with the subject of squatting. The existing system of licence fees and assessment on stock is abolished, in favour of a system of rent, assessed on the capabilities of runs at the rate of eight-pence a head for sheep and two shillings a head for cattle.<sup>5</sup> No licence is, in the future, to protect any run from sale or proclamation as a common,<sup>6</sup> and henceforth new runs are to be disposed of by auction, none being created of greater carrying capacity than 5000 sheep or 1250 cattle.<sup>7</sup> The licensee of a run is not to cultivate any more land than will be sufficient for the supply of his own family and establishment, but he may transfer his interest in a run or part of it, and on ejectionment he may recover modified compensation for improvements effected by him with the consent of the Board of Land and Works, or be allowed to purchase the land on which they are made (not exceeding 320 acres) at the statutory minimum of £1 an acre.<sup>8</sup> The Act also provides that one-fourth of the total Land revenue shall be devoted to the assistance of emigration from the United Kingdom.<sup>9</sup>

The Act of 1862 was only intended to operate until the close of the year 1870,<sup>10</sup> but before its expiry its provisions were substantially modified by the "Amending Land Act 1865."<sup>11</sup> The latter statute abolishes the geographical reserve of the Act of 1862, authorises<sup>12</sup> the proclamation of new counties, and merely empowers the Government to proclaim agricultural areas when surveyed, and to throw them open for selection.<sup>13</sup>

<sup>1</sup> 25 Vic. No. 145, § 22.    <sup>2</sup> § 34.

<sup>3</sup> § 36.    <sup>4</sup> § 39.

<sup>5</sup> §§ 82-83.

<sup>6</sup> § 80.

<sup>7</sup> §§ 98-200.

<sup>8</sup> §§ 204-222.

<sup>9</sup> § 38.

<sup>10</sup> § 135.

<sup>11</sup> 28 Vic. No. 237.

<sup>12</sup> § 3.

<sup>13</sup> § 9.

For the future, however, selectors are only to be entitled to seven-year leases of their allotments, at rents of two shillings an acre, until they have resided upon them for three years, and have made improvements of the value of £1 an acre. They are then to be entitled to purchase the fee-simple at the fixed price of £1 an acre.<sup>1</sup> No selector is to obtain more than 640 acres of agricultural land.<sup>2</sup> If he pleases, at the end of his three years, the selector may require the Government to put up his land to auction at the reserve of £1 an acre *plus* the value of his improvements, and to have the value of his improvements repaid out of the purchase money.<sup>3</sup> The selector may not part with his interest until three years from the commencement of his term.<sup>4</sup>

All lands not included in agricultural areas (as well as those reserved for townships in agricultural areas) are by the Act of 1865 authorised to be sold by auction.<sup>5</sup> Increased provisions are made for commons, and for leases for industrial purposes.<sup>6</sup> The rules on the subject of squatting are also slightly amended.<sup>7</sup>

The whole subject was recoded by "The Land Act 1869," which provided for the acquisition of the fee-simple of Crown land in two ways, viz. by occupation and improvement, followed by grant, and by immediate purchase. With regard to the former process, the intending purchaser is to be entitled to apply to a Land officer for licence to occupy any land not exceeding 320 acres and not being within the limits of a city, town, or borough, for a period of three years, at a fee of two shillings an acre for each year.<sup>8</sup> If the licensee resides on his allotment for at least two years and a half, and, within the three years, effects substantial improvements of the value of £1 an acre, he is to be then entitled either to a grant of his allotment upon payment of fourteen shillings an acre, or a lease for a further period of seven years at an annual rent of two shillings an acre, with a right to purchase the fee-simple at any time upon payment of the difference between the total amount of his rent paid since the commencement of the lease and the statutory price of £1 an acre.<sup>9</sup> The interest of the licensee is not saleable, nor even descendible.<sup>10</sup>

<sup>1</sup> 28 Vic. No. 237, § 14.<sup>2</sup> § 15.<sup>3</sup> §§ 16, 20.<sup>4</sup> § 22.<sup>5</sup> § 32.<sup>6</sup> §§ 37-54.<sup>7</sup> §§ 55-63.<sup>8</sup> 33 Vic. No. 360, §§ 18-21.<sup>9</sup> § 20.<sup>10</sup> § 28.

In the case of the immediate purchase, the lands are put up to auction at the orthodox minimum reserve. But there is a limit of 200,000 acres on the sales of Crown land during any one year, and a sum of £200,000 a year, arising from the sale or alienation of Crown lands under the Act, is to be appropriated towards the construction of railways or the extinguishment of railway debentures.<sup>1</sup>

In the Act of 1869 the powers of the Government with regard to the proclamation of commons are greatly simplified by the abolition of the various distinct classes of commons before existing, and the conferring of general authority on the subject.<sup>2</sup> The provisions on the subject of squatting are mainly continued, except that no claim for compensation for improvements is to be recognised after the 31st December 1870.<sup>3</sup> On the other hand, the pre-emptive right to the homestead is to be continued.<sup>4</sup>

The scheme of the Act of 1869, with its various amendments,<sup>5</sup> was in the year 1884<sup>6</sup> replaced by another scheme, which, with its amendments and the Mallee scheme of 1883,<sup>7</sup> has been incorporated into the consolidated Land Act 1890. By this Act the unalienated lands of the Crown in the colony are arranged in eight classes, each having its own special regulations. The names of these classes and their respective areas are recorded in maps sealed with the seal of the Board of Land and Works, and deposited with the Clerk of the Parliaments.<sup>8</sup> They may be enumerated as follows.

*a. Pastoral lands*, which are to be divided into allotments, varying in capacity from 1000 to 4000 sheep, or from 150 to 500 head of cattle.<sup>9</sup> These allotments may be leased for any period which will expire before the 30th December 1898, but the fee-simple may not be sold.<sup>10</sup> The lease is granted to the first applicant,<sup>11</sup> provided that he is not already tenant of an allotment.<sup>12</sup> The annual rent to be reserved upon the lease

<sup>1</sup> 33 Vic. No. 360, §§ 34-43.      <sup>2</sup> §§ 57-62.      <sup>3</sup> § 80.      <sup>4</sup> § 79.

<sup>5</sup> *E.g.* 39 Vic. No. 515 (which raised the rental of squatting runs to one shilling a head for sheep and five shillings a head for cattle), 42 Vic. No. 634 (which increased the term and decreased the rent of the allotment licenses), 43 Vic. No. 653, 44 Vic. No. 681.

<sup>6</sup> By the 48 Vic. No. 812.

<sup>7</sup> 47 Vic. No. 766, 48 Vic. No. 795, 49 Vic. No. 875, 53 Vic. No. 1040.

<sup>8</sup> Land Act 1890, § 6. There is, however, really a ninth class of lands described as being within the "Mallee Country" (§ 145).

<sup>9</sup> § 19.

<sup>10</sup> §§ 20, 21.

<sup>11</sup> § 22.

<sup>12</sup> § 21.

is to be at the rate of one shilling a head for sheep and five shillings a head for cattle, according to the carrying capacity of the run, with a maximum estimate of 10 acres to a sheep or 50 to each head of cattle.<sup>1</sup>

The interest of the lessee is not transferable without the consent of the Board of Land and Works, he must within three years destroy all the vermin<sup>2</sup> upon his land, and keep it free from vermin and spreading weeds, and he must not destroy timber without Government permission.<sup>3</sup> The Government reserves the right of resuming any part of his land for public purposes, and of granting working licences for industrial purposes to strangers.<sup>4</sup> The Crown may also resume the land without special object upon giving three years' notice, and upon payment for improvements made before the notice.<sup>5</sup> Moreover, on the expiry of his term, the tenant is entitled to be paid by the incoming lessee the value of his improvements (limited to half-a-crown an acre) so far as they have increased the value of the land for pastoral purposes,<sup>6</sup> and at any time during the term he may select a homestead of not more than 320 acres upon payment of £1 an acre.<sup>7</sup>

*b. Agricultural and Grazing lands*, which are divided into "grazing areas" of varying size, not exceeding 1000 acres each.<sup>8</sup> These grazing areas are dealt with in two distinct ways:—

1. They are granted, at annual rents of from twopence to fourpence an acre, under terms of lease very similar to those described under the heading of "Pastoral Lands," except that the lessee is bound to fence within three years, and on the expiry of his term he may recover from the incoming tenant for the value of his improvements up to ten shillings an acre.<sup>9</sup>
2. Parts of them, not exceeding 320 acres in any case, may be set aside as "agricultural allotments" on the application of the respective lessees, provided that such applicants have not selected, under previous Land Acts, allotments which, with the new selection, will give them more than 320 acres altogether.<sup>10</sup> Such applicants receive occupation licences for periods of six years at one shilling an acre.<sup>11</sup> Their interest is not transferable,<sup>12</sup> but if they

<sup>1</sup> Land Act 1890, § 26.

<sup>2</sup> "Vermin" includes kangaroos, wallabies, dingoes, stray dogs, foxes, and rabbits, and any other animal or bird proclaimed by the Governor in Council (§ 4).    <sup>3</sup> § 27.    <sup>4</sup> *Ibid.*    <sup>5</sup> *Ibid.*    <sup>6</sup> § 28.    <sup>7</sup> § 29.

<sup>8</sup> § 30.

<sup>9</sup> §§ 32, 37, 38.

<sup>10</sup> §§ 33, 34.

<sup>11</sup> § 42.

<sup>12</sup> It may, however, be pledged under certain conditions (§§ 56-63).



occupy under it for five years of the six, and make certain improvements, they are entitled at the expiry of the six years to grants of the fee-simple at fourteen shillings an acre, or to leases for fourteen years at one shilling an acre, with the right of pre-emption at any time during the term upon payment of the difference between the amount of rent already paid and the statutory minimum of £1 an acre.<sup>1</sup> Very stringent provisions exist<sup>2</sup> to prevent these agricultural allotments being obtained by any but *bona fide* intending settlers, not already entitled to the maximum of 320 acres. "Non-residence licences" for improvement purposes, at double rents, may however be issued,<sup>3</sup> and any licensee or lessee of an agricultural allotment may obtain a grant of an area not exceeding twenty acres for an orchard or vineyard at a price which, with the rent paid, will make up the statutory minimum.<sup>4</sup>

For purposes of this class of lands a person of the age of eighteen years is deemed to be legally of full age.<sup>5</sup>

*c. Auriferous lands*, which, like the pastoral and grazing areas, may not be alienated in fee-simple, but of which annual grazing licences, renewable for five years, may be granted.<sup>6</sup> But no licensee is to occupy more than 1000 acres of auriferous lands, and his occupation is not to interfere with mining pursuits.<sup>7</sup> The rent at which he holds is to be fixed by valuers appointed by the Board of Land and Works.<sup>8</sup>

*d. Lands which may be sold by auction.* Certain other areas are defined as those which may be sold out and out by public auction at a minimum upset price of £1 an acre.<sup>9</sup> Not more than 100,000 acres may be thus sold in any one year, and no "country"<sup>10</sup> lands may be sold until a schedule of them has been laid before both houses of Parliament.<sup>11</sup> Streets, roads, and townships may be proclaimed, and the land in the townships sold by auction.<sup>12</sup> The produce of all auction sales is paid into "The Railway Construction Account," to make provision for the construction of Government railways.<sup>13</sup>

*e. Swamp lands*, situated in five localities. These may be reclaimed by the Government with prison or other labour, under the supervision of the Board of Land and Works, and, when reclaimed, may be leased in allotments not exceeding

<sup>1</sup> Land Act 1890, § 44.

<sup>2</sup> § 43.

<sup>3</sup> § 49.

<sup>4</sup> § 55.

<sup>5</sup> § 36.

<sup>6</sup> §§ 65-67.

<sup>7</sup> §§ 67, 68.

<sup>8</sup> § 67.

<sup>9</sup> § 69.

<sup>10</sup> "Country" lands are those which are not comprised within the limits of a city, town, or borough (§ 4).

<sup>11</sup> § 69.

<sup>12</sup> § 73.

<sup>13</sup> § 73.

160 acres, for terms not exceeding twenty-one years.<sup>1</sup> But the fee-simple may not be sold.<sup>2</sup>

*f. State forests.* These may not be disposed of in any way except under grazing licences or licences to cut timber.<sup>3</sup>

*g. Timber reserves.* These may not be alienated in fee-simple, but, as they become denuded of timber under licensed cutting, they may be added to the pastoral or agricultural and grazing lands, and dealt with in such capacities.<sup>4</sup> State forests and timber reserves may be placed under the control of Local Forest Boards.<sup>5</sup>

*h. Water reserves, i.e.* the catchment areas, from which are fed the streams which supply water for public domestic purposes, are absolutely prohibited from alienation in any manner whatsoever,<sup>6</sup> except for certain public purposes.<sup>7</sup>

The Act also enables the Governor in Council to grant leases or licences of small areas for industrial purposes, for periods not exceeding twenty-one years in any case; but where the lands in question are within the limits of a city, town, or borough, the leases must be put up to auction.<sup>8</sup> Moreover, commons may be proclaimed and placed under the control of an existing local authority, and managers may be appointed to enforce the destruction of vermin and the eradication of weeds.<sup>9</sup> Every lease of a pastoral allotment or grazing area is subject to the entry for gold-mining purposes of the holder of a miner's right or mining lease, without compensation for surface damage, and every grant, and every lease or licence made with right of pre-emption, is subject to a similar entry on payment of compensation.<sup>10</sup> Moreover, any traveller is entitled to depasture his cattle and sheep upon any unsold Crown lands within a quarter of a mile of any road or track, except in certain counties named, where the right is restricted to cattle, and to similar lands within a quarter of a mile of a surveyed road.<sup>11</sup> But twenty-four hours' notice of such intention must be given to the occupiers, and a reasonable rate of progress must be made each day.<sup>12</sup> Finally,

*i. Mallee lands,* or lands comprised within the Mallee Country in the north-western district of the colony, amounting

<sup>1</sup> Land Act 1890, §§ 79, 81, 85.

<sup>2</sup> § 80.

<sup>3</sup> §§ 86, 87.

<sup>4</sup> §§ 88, 89.

<sup>5</sup> §§ 91-96. <sup>6</sup> § 90.

<sup>7</sup> § 100.

<sup>8</sup> §§ 97-99.

<sup>9</sup> §§ 200-118.

<sup>10</sup> §§ 118 and 119.

<sup>11</sup> § 181.

<sup>12</sup> § 182.

to about 10,000,000 acres, are subject to special rules. The peculiarity of these lands appears to be that they are covered with a scrub having a fibrous root of great tenacity, which scrub harbours large quantities of "vermin."

The Mallee Country is to be divided into "blocks," each of which is to be subdivided into two parts designated respectively A and B on the Government maps.<sup>1</sup> The right to a lease of a mallee block, for a term of years fixed by the Governor in Council, but not exceeding 20 years from the 1st December 1883, is put up for sale by auction, and the successful bidder is entitled to take such lease of either part, according to his option, and must "occupy" the other part for a period of five years from the date of the lease.<sup>2</sup> The southern and eastern border lands of the Mallee Country, known as the "Mallee Border," are to be divided into "mallee allotments," varying in size, but not exceeding in gross area 20,000 acres each. And such allotments may be leased to any applicant for a term similarly limited as in the case of mallee blocks, provided that no person shall hold more than 20,000 acres of mallee allotments.<sup>3</sup> Moreover, any mallee block may be subdivided into allotments, if applicants are forthcoming sufficient to take them all up.<sup>4</sup>

The rent reserved on the leased part of a mallee block is to be twopence a head on sheep and a shilling on cattle for the first five years, twice these amounts for the next five years, and thrice for the third five years, each calculated upon the average number of head actually depasturing on the land. For the "occupied" portion of the block, the rent is to be at the lowest rate.<sup>5</sup> The lessee is not to cultivate, assign, or sublet his land without the permission of the Board of Land and Works, he must destroy within three years and afterwards keep out the vermin from both portions, and must keep all improvements in repair.<sup>6</sup> The Crown may re-enter, upon three years' notice and payment of compensation.<sup>7</sup> Similar conditions, except as to "occupied" portions, apply to the leases of mallee allotments.<sup>8</sup> No alienation in fee-simple of mallee lands is allowed,<sup>9</sup> and lands alienated prior to 1883 in the Mallee

<sup>1</sup> Land Act 1890, §§ 145 and 146.

<sup>2</sup> §§ 147-149 and 152 and 153.

<sup>3</sup> §§ 155-157.

<sup>4</sup> § 155.

<sup>5</sup> §§ 160, 161.

<sup>6</sup> § 162.

<sup>7</sup> *Ibid.*

<sup>8</sup> § 164.

<sup>9</sup> Save as appears by the next page.

Country may be compulsorily repurchased by the Crown.<sup>1</sup> The Board of Land and Works is to be deemed the "occupier" of any unleased or otherwise unoccupied mallee lands.<sup>2</sup> The Governor may from time to time proclaim any "vermin districts" within the Mallee Country or Mallee Border, and thereupon the owners, lessees, and occupiers of all lands within the district must annually elect five duly qualified persons as a local committee for the destruction of vermin within the district.<sup>3</sup> Votes can be claimed according to a scale varying with the claimant's possessions in cattle and sheep.<sup>4</sup> The business of the local committee is to ensure the destruction of vermin within its district, and for that purpose it must recommend to the Governor an annual rate upon each square mile of land within its district as well as upon the sheep and cattle kept thereon.<sup>5</sup> This rate, when proclaimed by the Governor, becomes payable by the owners, lessees, and occupiers at the times appointed for payment of the rents of the latter, to the Minister, by whom it is handed over to the local committee, to be by them expended, along with the Government grant, in measures for the destruction of vermin.<sup>6</sup> In like manner, the local committee may recommend a "fencing rate" to defray the interest of the money expended by the Board of Land and Works in the erection of vermin-proof fences in the district.<sup>7</sup> If any owner, lessee, or occupier within the district fails to destroy the vermin on his land, the local committee or, in the event of their failure, the local committees of adjoining districts, may enter and do so, charging him with the cost of the proceedings.<sup>8</sup>

Within a period of three years from the 25th November 1889,<sup>9</sup> the lessee or assignee of a mallee allotment is entitled to select such part of it as, with his previous selections, will not exceed in the whole 320 acres, and the part selected thereupon becomes an "agricultural allotment." But in the event of his exercising his right the selector is liable to have his other holding in a "mallee allotment" reduced to 1000 acres.<sup>10</sup>

The economic results of this varied programme of land

<sup>1</sup> Land Act 1890, §§ 166-169.    <sup>2</sup> §§ 159, 171.    <sup>3</sup> §§ 186, 187.    <sup>4</sup> § 187.

<sup>5</sup> § 190.    <sup>6</sup> § 191.    <sup>7</sup> § 192.    <sup>8</sup> §§ 194-199.

<sup>9</sup> The passing of the 53 Vic. No. 1040.    <sup>10</sup> Land Act 1890, §§ 203, 204.

policy, brought up to the close of the year 1889, may be stated in bare outline. Of the fifty-six million acres of land in Victoria, which all were, originally, vested in the Crown, there remain more than half still undisposed of. Of this area, about eighteen million acres (including eleven millions and a half of "mallee lands") are occupied for pastoral purposes, seven million acres form reserves for public purposes, and eight millions are still available for settlement. The average price realised for lands sold absolutely by auction during the year 1889 was £5 : 7 : 8 an acre, the total area thus disposed of being 13,681 acres. The total amount of money which the Crown has received for the sale of lands since the founding of the colony is £23,811,586, not allowing for interest on deferred payments. For the last ten years the amount of Crown land sold by auction has generally been from 20,000 to 30,000 acres *per annum*, but the amount acquired by selection has substantially fallen off since the coming into operation of the Act of 1884. The number of leases of pastoral lands existing in 1889 was only 94, but a large number of "grazing areas" were temporarily occupied under lease or licence. Substantial progress has been made in the settlement of the "Mallee Country."

Amongst the agricultural purposes to which the land is devoted, the growing of wheat is by far the most important, occupying five times as many acres as any other crop. The average produce of wheat in the last eighteen years has been 11·65 bushels to the acre, but, with the exception of one or two very good years, there has been a notable falling off in the crop since 1878.<sup>1</sup>

Besides his duties in connection with this elaborate scheme of land alienation, the Commissioner of Crown Lands and Survey controls the administration of the public parks, pleasure gardens, and reserves, the management of which, in so far as it is not in the hands of specially appointed trustees or municipal bodies, is by statute vested in the Board of Land and Works.<sup>2</sup> He also works the machinery of the Land Tax Act, by which, speaking broadly, every owner of land amounting to 640 acres in area, and being above the value of £2500, pays an annual

<sup>1</sup> Cf. statistics in Hayter's *Year Book of Victoria*, 1890, §§ 375-391.

<sup>2</sup> Land Act 1890, § 136.

land tax of twenty-five shillings per cent upon the capital value of his land.<sup>1</sup>

5. THE COMMISSIONER OF PUBLIC WORKS, who is generally charged with the supervision of those functions of the Board of Land and Works which are not included in the duties of the Commissioner of Crown Lands. According to present arrangements, these functions include the erection and maintenance of public buildings, the construction and management of extra-municipal<sup>2</sup> roads, and the distribution of the grants to municipal authorities in aid of the construction of municipal roads, the management and completion of the scheme of the Melbourne water supply,<sup>3</sup> and the construction and maintenance of public sewers,<sup>4</sup> and bridges.<sup>5</sup>

6. THE COMMISSIONER OF TRADE AND CUSTOMS, who is charged with the duty of collecting the Customs and Excise revenues, and with the supervision of ports, harbours, and navigation generally, as well as the control of immigration.

7. THE MINISTER OF PUBLIC INSTRUCTION, whose main function is to supervise the machinery of the elementary education system provided by the Government, but who also distributes the grants made by the Treasury to institutions for the promotion of higher and technical education, such as the University of Melbourne and the various Schools of Mines. The office dates from the year 1873, having been established under the Education Act 1872.<sup>6</sup> At that date, the community definitely undertook to provide a complete system of primary education for its members, after having hesitated some time between the voluntary and the Government schemes. As the influence of this resolution will probably prove to be one of the most important factors in the future history of the colony, it may be well just to sketch the outline of the scheme.

To borrow familiar, though, perhaps, not very accurate

<sup>1</sup> Land Tax Act 1890, §§ 3 and 4. And *Docker v. The Queen*, 5 V. L. R. (L.) 316.

<sup>2</sup> Public Works Act 1890, § 19.

<sup>3</sup> There is also sometimes a separate "Commissioner of Water Supply" for the country districts, where the regular distribution of water is not undertaken by the Government. The powers of the Board of Land and Works, so far as they relate to the Water Supply of Melbourne, have now been transferred, by Order in Council, to the "Melbourne and Metropolitan Board of Works," created by the 54 Vic. No. 1197.

<sup>4</sup> Public Works Act 1890, §§ 69-99.

<sup>5</sup> Now largely subject to the powers of the municipal authorities.

<sup>6</sup> 36 Vic. No. 447.

terms, the public education of Victoria is "free, secular, and compulsory." Instruction in the following branches is absolutely gratuitous—

Reading	Geography
Writing	Drill
Arithmetic	Health and Temperance
Grammar	Sewing (for girls)
Singing	} where practicable.
Drawing	
Gymnastics	

Parents who desire their children to be taught in other subjects pay fees according to a scale fixed by the Government.<sup>1</sup>

Instruction is also "secular." No teacher may give any other than secular instruction in a Government school during the normal four hours set apart for compulsory instruction. The buildings may be used for other purposes out of school hours, but attendance on such occasions is purely voluntary.<sup>2</sup>

And instruction is "compulsory." The parents of all children between the ages of six and thirteen are bound to cause them to attend a Government school during the normal four hours for forty days in each quarter of the year, unless they can claim exemption on one of the following grounds—

Efficient instruction elsewhere.<sup>3</sup>

Sickness, fear of infection, or other unavoidable cause.

Distance of residence from nearest school (two miles up to nine years, two-and-a-half from that age to twelve, and three miles from twelve to thirteen).

Education up to the required standard.

Moreover, if a child of thirteen ceases to attend school without having been for four quarters in the fourth class, he must, until the age of fifteen, attend some other school for not less than five hours a week, unless specially exempted.<sup>4</sup>

School districts may be proclaimed by the Governor in Council, and thereupon the resident ratepayers must elect Boards of Advice, consisting of not less than five nor more than seven

<sup>1</sup> Education Act 1890, § 22 and 3d Sched. A part of these voluntary payments goes to the teachers, in addition to their regular stipends (§ 23).    <sup>2</sup> § 11.

<sup>3</sup> Opportunity for the testing of such instruction is afforded by the half-yearly examinations for children not attending government schools held by the district inspectors.

<sup>4</sup> Education Act 1890, § 13. There are six classes in each school, and the teaching throughout Victoria is on an uniform plan. (Does any one know how the orthodox number of six classes appeared in Anglo-Saxon school systems?)

persons, subject to removal by the Governor in Council. These Boards of Advice have the following duties—

1. To control (subject to the approval of the Minister) the use of the school buildings out of hours.
2. To report on the condition of the school premises and appliances.
3. To suspend temporarily any teacher for misconduct.
4. To visit and record the state of attendance and their opinion of the management of the schools.
6. To induce parents to send their children regularly, and to report the names of defaulters.
6. To recommend rewards and scholarships for promising scholars.<sup>1</sup>

The officials and teachers in the Government schools are public officials appointed by the Governor in Council.<sup>2</sup> In most respects they are subject to the rules of the permanent civil service, under the Public Service Act, but, as the teachers are in the nature of specialists, their promotion and transfer is regulated by rules specially applicable to them alone.

For this purpose, there is a "Committee of Classifiers," consisting of the Inspector-General of the Education Department, a person (not a public official) appointed from time to time by the Governor in Council, and the headmaster of a Government school with an average attendance of least 400, specially elected by the certificated teachers for a period of three years.<sup>3</sup> This Committee prepares a roll which contains classifications both of schools and teachers. The schools are arranged in five classes, according to the average attendance of scholars, and the teachers in five corresponding classes, according to various qualifications of sex, experience, and attainments. Pupil teachers, sewing mistresses, teachers of night schools, students in training, and instructors in drill, drawing, and gymnastics are also classified by the Committee.<sup>4</sup> Each class of teachers, except the first, is further subdivided into three sub-classes according to the claims formerly enumerated, with the addition of length of service.<sup>5</sup> The classified roll is revised every three years, and may, in the meantime, be supplemented.<sup>6</sup> An appeal from the classification lies to the Public Service Board.<sup>7</sup>

Appointments and promotions to teacherships in the Education Department can only be made upon a request to the

<sup>1</sup> Education Act 1890, § 20.

<sup>2</sup> § 5.

<sup>3</sup> Public Service Act 1890, §§ 65 and 66.

<sup>4</sup> § 78 and 4th Sched.

<sup>5</sup> § 76.

<sup>6</sup> §§ 77 and 78.

<sup>7</sup> § 80.



Minister by the secretary, and then only upon a certificate of the Public Service Board that such appointments or promotions are required.<sup>1</sup> Each appointment is made on probation for one year.<sup>2</sup> Every school must be under the charge of a head teacher of the corresponding class in the roll, and in the case of schools having an average attendance of more than fifty scholars, and also of part-time schools, the head teachers must be males.<sup>3</sup> Subject to certain exceptions, the qualified candidate next on the roll or employment register is entitled to claim the vacancy.<sup>4</sup> Transfers from one school to another in the same class may be refused by the teachers to whom they are offered, unless the secretary of the department and the Inspector-General jointly certify that they are needed in the public interest.<sup>5</sup> A teacher may be required by the Minister to reside in the neighbourhood of his school, if the secretary of the Education Department certifies that such residence is desirable in the interests of the school.<sup>6</sup>

8. THE MINISTER OF DEFENCE, appointed under the powers of the Officials in Parliament Act of 1883,<sup>7</sup> upon the rearrangement of the Victorian military system in that year.<sup>8</sup>

By this new scheme the control of the naval and military forces in Victoria is placed in the hands of a Council of Defence, consisting of the Minister and the five chief officers of the different branches of the service, three members forming a quorum.<sup>9</sup> The Council itself works under regulations issued by the Governor in Council, but it is its duty to make recommendations to the Government with regard to the exercise of its powers,<sup>10</sup> and to furnish an annual report upon the condition of the forces.<sup>11</sup> The forces connected with the service of Victoria may be classed into three divisions.

*a. The permanent naval and military forces of Victoria.* These are raised and commissioned by the Governor, in pursuance of parliamentary authority, and placed under his command. Each member of the forces, before joining, enters into a sworn agreement of service, which may only be annulled in the prescribed way.<sup>12</sup> Those engaged as naval troops are subject, both

<sup>1</sup> Public Service Act 1890, § 88.

<sup>2</sup> § 89. In some cases the appointees are required to insure their lives.

<sup>3</sup> § 90.      <sup>4</sup> § 91.      <sup>5</sup> § 96.      <sup>6</sup> § 105.      <sup>7</sup> 47 Vic. No. 780.

<sup>8</sup> 47 Vic. No. 777.

<sup>9</sup> Defences and Discipline Act 1890, §§ 9 and 10.

<sup>10</sup> § 11.

<sup>11</sup> § 13.

<sup>12</sup> § 8.

ashore and afloat, to the enactments and regulations for the time being in force for the discipline of the Royal Navy,<sup>1</sup> and all the members of the forces are amenable to the regulations for discipline published by the Governor.<sup>2</sup> Moreover, in time of actual service, members of the military forces are subject to the provisions of the Imperial "Army Discipline and Regulation Act."<sup>3</sup> Courts-martial may be appointed by the Governor with power, subject to challenge, to fine up to £50, and imprison with or without hard labour, up to six months,<sup>4</sup> but no sentence can be acted upon till it has been confirmed by the Governor.<sup>5</sup> The commanding officer may fine up to twenty shillings or award solitary confinement up to twenty-four hours for minor offences against discipline.<sup>6</sup> A sum of £145,000 a year is regularly to be available for the expense of the permanent forces until the 31st December 1891, and any surplus of any year may be carried forward to the next.<sup>7</sup>

*b. The Australasian Naval Forces*, an Imperial squadron to which the Governments of the various Australasian colonies contribute annually, according to their respective populations, for a period of ten years.<sup>8</sup> The agreement under which this arrangement has been made provides that the squadron shall consist of five fast cruisers and two torpedo gunboats, three of the former and one of the latter being always kept in commission, and the other three in reserve in Australasian ports; that none of the vessels shall be employed beyond the limits of the Australasian Station except with the consent of the colonial Governments; that the first cost shall be paid out of Imperial funds, and the interest on the actual expenditure recouped by the colonial governments to an amount not exceeding £35,000 a year in all. The colonial Governments also contribute towards maintenance a sum not exceeding £91,000 a year. At the termination of the agreement (which can only happen after two years' notice), the vessels remain the property of the Imperial government.<sup>9</sup>

*c. Volunteer Forces*, which have existed in Victoria since the

<sup>1</sup> Defences and Discipline Act 1890, § 7.

<sup>2</sup> § 16. These are to be laid before Parliament within 14 sitting days.

<sup>3</sup> § 19.

<sup>4</sup> §§ 20-22.

<sup>5</sup> § 26.

<sup>6</sup> § 35.

<sup>7</sup> § 56. The accounts of this expenditure are to be laid before Parliament every year (§ 57).

<sup>8</sup> §§ 59, 60.

<sup>9</sup> Schedule VI.

year 1854.<sup>1</sup> As their name implies, they are voluntary associations, whose services have been accepted by the Government.<sup>2</sup> Though to a certain extent under Government regulations in the matter of enrolment and discipline,<sup>3</sup> they retain large powers of self-government. They may recommend members for promotion to officerships under the rank of captain,<sup>4</sup> the majority in any corps may make rules for the management of its affairs, which may be legally enforced after approval by the Government,<sup>5</sup> the members may individually withdraw from the service in time of peace,<sup>6</sup> or, on their own application, may be enrolled as a corps among the permanent forces, and placed on a similar footing with regard to discipline and pay.<sup>7</sup> Volunteer corps may be called out "in all cases of actual invasion of Victoria, or hostile or predatory attack thereon, or of imminent danger thereto," and they then become subject to the discipline of the permanent forces in time of war,<sup>8</sup> are entitled to pay, if demanded, and may be quartered and billeted as regular troops.<sup>9</sup> The Governor may also accept the services of cadet corps of volunteers, who do not take the oath of allegiance, and may not be sent on active service.<sup>10</sup>

9. THE SOLICITOR-GENERAL and the MINISTER OF JUSTICE, offices usually alternative, though occasionally both filled at once.<sup>11</sup> The Solicitor-General or the Minister of Justice appears to act in two capacities. In the first he is the deputy of the Attorney-General, as the legal adviser of the Government and legal representative of the Crown; but inasmuch as the Minister of Justice is not technically a "Law Officer,"<sup>12</sup> it would seem that he cannot act as fully in all cases as the Solicitor-General. In his second capacity the Solicitor-General or the Minister of Justice administers a portion of the legal machinery of the Government, generally the county courts, the courts of insolvency, and the courts of general and petty sessions.

10. THE MINISTER OF RAILWAYS, who became necessary upon the establishment of the system of Government railways

<sup>1</sup> 18 Vic. No. 7, amended by 19 Vic. No. 8, etc.      <sup>2</sup> § 65.      <sup>3</sup> § 66.

<sup>4</sup> § 68.      <sup>5</sup> Defences and Discipline Act 1890, §§ 70-71.      <sup>6</sup> § 72.

<sup>7</sup> § 50.      <sup>8</sup> § 77.      <sup>9</sup> § 79.      <sup>10</sup> § 81.

<sup>11</sup> *E.g.* in 1890, when Mr. Cuthbert was Minister of Justice and Mr. Deakin Solicitor-General.

<sup>12</sup> Acts Interpretation Act 1890, § 5.

in the year 1857, and since greatly developed.<sup>1</sup> The Minister is the person responsible to Parliament for the working of the railway department, and the expenditure of the funds voted for it, but the actual property in and management of the Government railways are vested in a corporate body of three Railways Commissioners, appointed under a statute of 1883,<sup>2</sup> by the Governor in Council, for a period of seven years. The Commissioners, who consist of a permanent Chairman and two ordinary commissioners, cannot be removed from office except upon Addresses by both Houses in the same session, or of the Assembly in two consecutive sessions, unless they incur one of the following disqualifications—

1. Acceptance of other employment.
2. Insolvency.
3. Acceptance of personal interest in any contract made by the commissioners.
4. Absence without leave, incapacity, or resignation.<sup>3</sup>

The Chairman of the commission may decide upon action against the views of his colleagues, after postponement of the discussion for twenty-four hours, but in such a case he must enter his reasons upon the Minutes and send a signed copy to the Minister.<sup>4</sup> In the management of the Government railways the Commissioners exercise the powers vested in the Board of Land and Works with regard to other public works.<sup>5</sup> They must make quarterly traffic returns to the Minister, and prepare a full annual report for Parliament.<sup>6</sup> They must also, before the second reading in the Assembly of any Railway Construction Bill, prepare an estimate of the cost and returns of each proposed new line.<sup>7</sup> All appointments to the railway service are in their hands, subject to certain limits, and they may make regulations with regard to employments and dismissals.<sup>8</sup> They may erect and manage a system of telegraphs, subject to certain claims of the post-office department.<sup>9</sup>

<sup>1</sup> 21 Vic. No. 35, 27 Vic. No. 186 ; Minister of Railways first appointed 1860. Private railways are perfectly legal, but they are subject to Government inspection (Railways Act 1890, §§ 122-143).

<sup>2</sup> 47 Vic. No. 767. They have since been reappointed (cf. *G. G.* 1891, Feb. 6, etc.)

<sup>3</sup> Railways Act 1890, §§ 46-50. <sup>4</sup> § 44. <sup>5</sup> § 56. <sup>6</sup> §§ 58, 59. <sup>7</sup> § 61.

<sup>8</sup> §§ 70 and 92. Railway employes do not come under the Public Service Act.

<sup>9</sup> §§ 99, 100. By the Railways Standing Committee Act 1890 a standing committee of both Houses of Parliament has been appointed to report upon proposed railway extension (54 Vic. No. 1177).

Besides the Responsible Ministers whose functions have been enumerated, others, whose titles will sufficiently explain their duties, are frequently appointed. The most conspicuous examples are—

11. THE POSTMASTER-GENERAL,
12. THE COMMISSIONER OF WATER SUPPLY (for the country districts),
13. THE MINISTER OF AGRICULTURE,
14. THE MINISTER OF MINES (whose functions will appear in our account of local government), and
15. THE MINISTER OF HEALTH.

## CHAPTER XXXII

### THE POLICE FORCE

THE police force of Victoria is subject to a special form of government and special regulations which mark it off from the great body of the civil service, from which it is excluded by the provisions of the Public Service Act.<sup>1</sup>

The permanent head of the force is the Chief Commissioner of Police, who, with the acting Commissioner (if any) and all the officers of the force down to the grade of sergeant, is appointed by the Governor in Council.<sup>2</sup> The ordinary members of the force are officially known as "constables," and are appointed and dismissed by the Chief Commissioner, the number to be employed being signified by the Governor in Council.<sup>3</sup> A member of the force has the powers and duties of a constable by the common law, as well as those specially conferred by statute.<sup>4</sup> Each constable, other than a Chinese or aboriginal, binds himself by an oath of service, and cannot resign without three months' notice, even though his term of appointment has expired.<sup>5</sup>

The detailed duties and discipline of the police force are prescribed by Regulations of the Governor in Council, but the following special duties are imposed on every sergeant and constable by statute—

1. Attendance on the justices at general and petty sessions for the districts in which he is stationed.
2. Execution of recognisances and fines levied by the Supreme Court or any court of general or petty sessions, and of all process issued by justices of the peace.<sup>6</sup>

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<sup>1</sup> § 3.

<sup>3</sup> § 8.

<sup>4</sup> § 9.

<sup>2</sup> Police Regulation Act 1890, §§ 4-6.

<sup>5</sup> §§ 11-13.

<sup>6</sup> §§ 17 and 18.

Unlike the ordinary members of the civil service, the members of the police force are entitled to superannuation allowances on retirement, as well as to pensions on disablement. There is a Police Superannuation Fund, into which a sum of £2000 a year is paid out of the Consolidated Revenue, and which is supplemented by the fines imposed upon the members of the force, as well as those awarded to them on the conviction of offenders, and if necessary by a deduction from their pay. The payment of allowances is regulated by a Superannuation Board, subject to the approval of the Governor in Council.<sup>1</sup>

With regard to the offences of members of the force, an ordinary constable may be punished by fine or dismissal by the Chief Commissioner, a sergeant may be punished by the Commissioner by fine, or recommended for reduction or dismissal by the Governor in Council, while the misconduct of any superior officer is investigated by a board of three persons specially appointed by the Governor in Council.<sup>2</sup> Other members of the force accused of insubordination may also claim to be tried by a specially appointed board.<sup>3</sup> A member of the force acting in obedience to a warrant issued by a magistrate or reputed magistrate is not responsible for any irregularity or want of jurisdiction in the warrant or magistrate.<sup>4</sup>

<sup>1</sup> Police Regulation Act 1890, §§ 20-33.

<sup>2</sup> §§ 39-41.

<sup>3</sup> § 42.

<sup>4</sup> § 57.

## CHAPTER XXXIII

### OTHER PUBLIC OFFICIALS

As the political organs of a community undertake the performance of new functions, they need an increasing staff of functionaries, and the question of patronage becomes increasingly difficult. In democratic communities, the matter is even more pressing than in aristocratic societies, for whilst it is found that tendencies to corruption exist equally in both, in the democratic community it is less possible to preserve a cloke of decent silence. Everything is talked about, and there gradually grows up a class of persons who live by the discovery, or pretended discovery, of scandals. It may well be doubted whether the action of these self-appointed censors is, in the long run, productive of more good than harm, and whether a cast-iron system of appointment and promotion is calculated to procure the best public service for a community. But it will be sufficient for us to examine here the actual system which the circumstances alluded to have produced in Victoria.

The system was introduced by a statute of the year 1883,<sup>1</sup> and was remodelled in 1889.<sup>2</sup> Practically it includes within its provisions every member of the Government civil service, except the Responsible Ministers of the Crown, the judges and higher officials of the courts of law, the officials of the Houses of Parliament and the Royal Mint, the members of the police force and the Government railway staff, and a few of the higher Government officials specially appointed under various statutes.<sup>3</sup> There are special provisions (before noticed) regarding the appointment of State school teachers, but they are subject to the general provisions of the Public Service Act.

<sup>1</sup> 47 Vic. No. 773.

<sup>2</sup> 53 Vic. No. 1024.

<sup>3</sup> Public Service Act 1890, § 3.





To carry out the system, there is a Public Service Board consisting of three persons, appointed by the Governor in Council, and removable in the same way as the Railway Commissioners.<sup>1</sup> Two members of the Board constitute a quorum, and each member receives a salary of £1500 a year, permanently appropriated for the purpose.<sup>2</sup> The appointments have hitherto been made for indefinite periods.<sup>3</sup>

The principal duties of the Board are as follow—

1. To investigate and report upon the efficiency, economy, and general working of any public department when required to do so by the Minister in charge of it.<sup>4</sup>

2. To make an annual report to the Governor in Council on the condition and efficiency of the public service.<sup>5</sup>

3. To increase or diminish, with the consent of the Governor in Council, the number of persons employed in any department, or to alter their distribution.<sup>6</sup>

4. To keep a record of the services of all persons (with certain exceptions) employed in the Public Service, and publish it annually.<sup>7</sup>

5. To certify, upon the happening of any vacancy which it is deemed desirable to fill up, the necessity for a new appointment and the name of the person entitled to such appointment.<sup>8</sup>

6. To keep a register of candidates for temporary employment under Government, and to select from such candidates persons best qualified to perform any work required.<sup>9</sup>

7. To make regulations for the following purposes—

a. The examination of candidates for admission to the service and for certain offices.<sup>10</sup>

β. The employment of women in the Public Service.<sup>11</sup>

γ. The fixing of the scale of remuneration for manual labour.<sup>12</sup>

δ. The compulsory life or annuity insurance of members of the Civil Service.<sup>13</sup>

ε. The securing of specially selected and suitable officials for the Public Library, Museums, National Gallery, and for penal establishments, reformatory schools, and lunatic asylums.<sup>14</sup>

ζ. The admission of certain supernumeraries to the service.<sup>15</sup>

<sup>1</sup> Public Service Act 1890, § 5.    <sup>2</sup> §§ 6 and 9.    <sup>3</sup> Cf. *G. G.*, 1st Feb. 1884, etc.

<sup>4</sup> Public Service Act 1890, § 11.

<sup>5</sup> § 13.

<sup>6</sup> § 27.

<sup>7</sup> § 28.

<sup>8</sup> §§ 32 and 37.

<sup>9</sup> § 38.

<sup>10</sup> §§ 40 and 59 (II.)

<sup>11</sup> § 42.

<sup>12</sup> § 59 (VIII.)

<sup>13</sup> *Ibid.* (IX.)    <sup>14</sup> § 60.

<sup>15</sup> § 61.

7. The duties of officers in the Public Service and the discipline to be observed by them.<sup>1</sup>

8. The procuring and inspection of stores for the government service.<sup>2</sup>

8. To hear appeals from the Committee of Classifiers for State school appointments.<sup>3</sup>

9. To investigate charges laid by the permanent head of a department against an official of the department, and referred by the Minister to the Board.<sup>4</sup>

10. To punish offences thus proved, by reduction of rank, forfeiture of increment, or dismissal from the service.<sup>5</sup>

11. To authorise payment for overtime.<sup>6</sup>

The Public Service (excluding the officials before alluded to) is divided into four divisions, known respectively as "first," "professional," "clerical," and "non-clerical."<sup>7</sup> The First Division contains the Clerk of the Executive Council, and eleven permanent heads of public departments. Its members, except those whose salaries are provided by special statute, are paid the amounts fixed by the Annual Appropriation Act.<sup>8</sup> The Professional Division comprises those offices for the discharge of which professional skill is required, as well as the inspectors and teachers in the education department. Its members are paid according to scale fixed by regulation and provided by the Annual Appropriation Act.<sup>9</sup> The Clerical Division, which, as its name implies, includes those officials whose duties consist of clerical labour requiring no special professional education, is subdivided into five classes, of which the first, second, and third are known as the "higher" classes, and the fourth and fifth as the "lower." The members of each class receive the minimum and maximum salaries and the annual increments provided by the Public Service Act.<sup>10</sup> The Non-Clerical Division comprises, practically, the officials of the service engaged in manual labour, and their wages are fixed by Regulations of the Public Service Board.<sup>11</sup>

No new appointment in the service can be made, except upon a request from the permanent head of a department to the Minister, accompanied by a certificate from the Public

<sup>1</sup> Public Service Act, § 123.

<sup>2</sup> § 139.

<sup>3</sup> § 80.

<sup>4</sup> § 124 (II.)

<sup>5</sup> *Ibid.*

<sup>6</sup> § 141.

<sup>7</sup> § 15.

<sup>8</sup> §§ 16 and 22.

<sup>9</sup> § 23. But the maximum and minimum salaries of the teachers are fixed by the Schedules to the Public Service Act.

<sup>10</sup> §§ 19, 20, 23.

<sup>11</sup> § 59 (VIII.)

Service Board, stating that the appointment is necessary, and naming the person entitled.<sup>1</sup> In the case of appointments to the First or Professional Divisions, the person thus named must, if possible, be already a member of the service.<sup>2</sup> In the case of new appointments to the Clerical Division, they must be made, in the first instance, to the fifth class, from applicants between the ages of sixteen and thirty, who have passed the required examination, which may be competitive if necessary.<sup>3</sup> Promotions to the First or Professional Divisions, or to the higher classes of the Clerical Division, may be made either from the officials next in rank in the department in which the vacancy occurs, or from the next rank in any other department, according to the recommendation of the Public Service Board.<sup>4</sup> But any official thus passing from the lower to the higher classes of the Clerical Division must have passed an examination severer than that required for the lower, unless he be an university graduate.<sup>5</sup> Promotions to the fourth class of the Clerical Division go by seniority and merit combined.<sup>6</sup>

Appointments to the Non-Clerical Division are also decided by competitive examination, except where the Board reports that the system of competitive examination could not be advantageously applied, and transfers from the Non-Clerical Division to the lowest class of the Clerical Division may be made on the recommendation of the Board, in the case of any official who has served for two years in the Non-Clerical Division.<sup>7</sup> In the case of examinations the Board may reduce the number of candidates by lot, to a number not less than three times the number of vacancies.<sup>8</sup> Candidates for the Non-Clerical Division must be between the ages of sixteen and forty, except in special cases.<sup>9</sup>

Every appointment to the public service is at first made upon probation only, for a period of six months,<sup>10</sup> and cannot be confirmed until the probationer has insured his life by a

<sup>1</sup> Public Service Act 1890, § 32.

<sup>2</sup> § 34. This rule does not apply to teachers in the Education Department.

<sup>3</sup> §§ 35, 53, 56. There is a special examination for candidates for the office of police magistrates who are not practising lawyers (§ 40).

<sup>4</sup> § 47.

<sup>5</sup> §§ 53, 54.

<sup>6</sup> § 48.

<sup>7</sup> §§ 53 and 52.

<sup>8</sup> § 59 (III.)

<sup>9</sup> § 36.

<sup>10</sup> § 32. In the case of appointments from outside the public service to a post in the professional division, the probationary term is for a period of three months only (§ 33).

non-assignable policy, in accordance with the Regulations of the Public Service Board.<sup>1</sup> An official can be called upon to retire upon attaining the age of sixty, and at sixty-five he retires as of course unless he is called upon by the Governor in Council to continue, and is willing to comply with the demand.<sup>2</sup> No ordinary official appointed since the passing of the Pensions Abolition Act of 1881<sup>3</sup> may receive any pension or allowance on retirement,<sup>4</sup> and no official under the Public Service Act (including members of the Public Service Board) may engage in any trade or calling, other than his official duties, either for himself or for another person, without the consent of the Governor in Council.<sup>5</sup>

On the other hand, no public official may be dismissed or punished except upon a reduction of the staff of a department made upon the recommendation of the Public Service Board, or for an offence duly reported to the Minister, who may lay the matter before the Board for investigation. The Board may, if it think fit, obtain the appointment of a special tribunal of three persons to investigate the charge, or it may do so itself. If the charge is established, the Board may reduce or fine the offender, deprive him of increment or leave of absence, or, with the consent of the Governor in Council, dismiss him from the service.<sup>6</sup> An official thus charged may be represented by counsel, and may adduce evidence in disproof of the charge.<sup>7</sup> A conviction for felony or infamous offence or insolvency forfeits the office, but an insolvent official may be reinstated, if he prove to the satisfaction of the Board that his insolvency was not due to fraud, extravagance, or dishonourable conduct.<sup>8</sup>

The Minister in charge of a department may grant leave of absence to an official for not more than three weeks in any year, and after twenty years' service an official may be granted a twelve months' furlough on the recommendation of the Board.<sup>9</sup> In addition to these allowances, there are eight statutory holidays in the year, and the Governor in Council may proclaim others.<sup>10</sup>

Finally, a register is kept of applicants for temporary employment, and in the event of urgent need by a Minister

<sup>1</sup> Public Service Act 1890, § 37.

<sup>2</sup> §§ 143-145.

<sup>3</sup> 45 Vic. No. 710.

<sup>4</sup> Public Service Act 1890, § 106.

<sup>5</sup> § 116.

<sup>6</sup> §§ 121, 124.

<sup>7</sup> § 125.

<sup>8</sup> § 126.

<sup>9</sup> §§ 133, 134.

<sup>10</sup> § 135.

for temporary assistance in his department, the Board, on the application of the permanent head, selects from the register suitable applicants, who may be employed for any period not exceeding three months, renewable twice, but not oftener. After the termination of an employment, the candidate cannot be employed again by the Government in a temporary capacity for a period of six months, except in special circumstances.<sup>1</sup>

<sup>1</sup> Public Service Act 1890, § 38.

## CHAPTER XXXIV

### THE LEGAL POSITION OF THE EXECUTIVE IN VICTORIA

THE exact position of the executive officials, under a constitution which is more or less dependent upon tradition for its authority, is always difficult to define. In Victoria this position is made additionally complex by the fact that the constitution, besides being largely traditional, is involved in somewhat vague relationship with another constitution, that of the British Empire.

The English principles on the subject were, however, laid down in fairly clear terms long before the founding of Victoria, and these principles, therefore, make an excellent foundation for an examination of the subject.

They may be stated in the form of five canons.

1. The Crown cannot be made personally responsible by any of the ordinary legal methods, for any act done by itself or its subordinates.<sup>1</sup> A Petition of Right may be presented to Her Majesty, and relief is usually granted upon grounds similar to those which would entitle the suppliant to judgment against a fellow-subject. But no claim, even though judicially declared valid, can be enforced, if the Crown does not choose to recognise it. A successful attempt to enforce such a claim would amount to a revolution. An unsuccessful one would probably be held to be treason.

2. Neither the Crown itself nor any of its officials can, as against a subject,<sup>2</sup> legally justify any act for which there is not

<sup>1</sup> *Tobin v. The Queen*, 16 C. B., N. S. 310.

<sup>2</sup> The question of aliens is more doubtful.

positive legal authority,<sup>1</sup> by the plea of state necessity.<sup>2</sup> In the very improbable case of the Crown personally offending against this rule, there would, of course, be no legal remedy. In the event of its breach by an official, the latter can be proceeded against in accordance with the next canon.

3. A Crown official, of however exalted a position, can be made personally responsible, for any illegal act committed by him against a fellow subject, by ordinary process of law.<sup>3</sup>

4. A subordinate cannot plead the illegal command of his superior as an excuse for his illegal act, except in very rare cases, specially excepted by statute.<sup>4</sup>

5. The Crown may enforce its legal claims by a special machinery not open to subjects.<sup>5</sup>

We may assume, I think, that these principles apply in Victoria. Some of them have been expressly adopted by statute,<sup>6</sup> the others form part of the unwritten law. The difficulty is not in the principles, but in their application.

It must be remembered that the position of the Crown with regard to the colonies retained its prerogative character longer than the position of the Crown in English affairs. Until the close of the last century, the real government of the colonies was vested in a committee of the Privy Council. Until the introduction of the Swan River Settlement Bill of 1829, Parliament seems to have held aloof from Australian matters.

But it will readily be admitted that long before the establishment of the present form of government in Victoria, the Colonial Office had become as thoroughly parliamentary as any other department of state. It becomes therefore important to look at the present state of the question.

The chief point to bear constantly in mind is, that the legislative and executive authorities of the colony are nominally distinct in their origin, the link between them being purely

<sup>1</sup> By this statement it is not, of course, meant to assert that for every exercise of power by the executive there must be statutory or even judicial authority. But the defendant must prove the existence of the prerogative on which he relies.

<sup>2</sup> *Wilkes v. Lord Halifax*, 19 St. Tr. (Howell) 1406.

<sup>3</sup> *Mostyn v. Fabrigas*, 20 St. Tr. 81, and *Hill v. Bigge*, 3 Moo. P. C. C., 465, followed recently in *Musgrave v. Pulido*, L. R. 5, App. Ca. 109.

<sup>4</sup> *Entick v. Carrington*, 19 St. Tr. 1080.

<sup>5</sup> E.g. by arrest on mesne process, information, etc.

<sup>6</sup> E.g. Crown Remedies and Liability Act 1890.

traditional. The legislative authorities were established by statute in 1855, and the prime and avowed object of the Constitution Act is to create a legislature, four-fifths of its provisions being occupied with that subject.

The executive, on the other hand, though it is incidentally alluded to in the Constitution Act, is mainly the creation of the Crown prerogative. Such powers with regard to the colonies as have not been engrossed by Parliament, remain with the Crown; and just as out of its authority the Imperial Parliament created the legislature of Victoria, so out of its authority the Crown from time to time creates the executive of Victoria.

This process of creation is, briefly, performed by the commissioning of a Governor, with power to appoint subordinates. The Crown does not by any means delegate the whole of its prerogatives, even as regards the colony, to the Governor; it gives him certain general and certain special powers, which have been previously discussed. One of these special powers is, as we have said, the power to appoint the subordinate members of the executive. But this power is qualified by statutory enactment, to which the Crown has assented, which provides that, with certain exceptions previously noticed, all appointments shall be made by the Governor with the advice of the Executive Council of the colony.<sup>1</sup> Moreover, as we have also seen, the advice which the members of the Executive Council may give in such cases is sharply limited by the Public Service Act, to which, as inhabitants of the colony, they are bound to conform.

It would appear then to be an undeniable conclusion for these facts—

1. That the members of the executive are entitled and bound to do everything which they are authorised or ordered to do by the legislature of the colony acting within its proper powers.

2. That the executive is further entitled to do anything which reasonably falls within the powers conferred upon the Governor by his commission. Whether a subordinate official is, as between him and his superiors, entitled to exercise any such power, is a question of discipline, which can

<sup>1</sup> Constitution Act, § 87.



only be settled by the disavowal or confirmation of the superior.

3. That any act done by any member of the executive, from the Governor downwards, not warranted by some rule of law, written or unwritten, is, however morally justifiable or even urgently necessary, an act for the consequences of which he is, unless indemnified by the legislature, personally liable. It is true that the executive acts in the name of the Crown, but as all its members, with the exception of the Governor himself and the Lieutenant-Governor, are appointed by the Governor, it is unreasonable to suppose that they can exercise greater powers by virtue of the prerogative than have been conferred on the Governor himself.

These principles are generally admitted. But there is a difficulty in the application of them. And this difficulty arises from the simple fact that much of British constitutional law is evidenced solely by tradition and precedent, which evidence is hard to interpret. In the case of a statute, the matter is simple. You must take the words of the statute and nothing more. The question is always what the law-maker did, not what he intended to do. And therefore it is not permissible to take into account any of the proceedings which led up to the passing of the statute.

Precisely the same question arises in the case of unwritten law, but it cannot be settled in the same way. In every disputed point the question is, What has been done on similar occasions in the past? The men who made the precedent made the law, but it does not follow that their successors may make a new law. That is the province of the legislator.

No doubt there is a great temptation, on certain occasions, to strain the power of the executive. These occasions occur especially in matters in which the wish of the executive is known to be in accord with the feelings of the majority of the community. But the community which allows such a straining of executive authority is really preparing a rod for its own back. The power which can be strained for the people may some day be strained against the people, and it will then appeal to precedent for its support. When a really overwhelming necessity for unauthorised action occurs, the illegality can be cured by a bill of indemnity. But it has been the steadfast

policy of Anglo-Saxon communities, for upwards of a century, to be very sparing in grants of indemnity, and to insist rigidly upon the observance of the law by officials and private citizens alike. The plea of "act of state" can now in England practically only be used against an alien suitor, and even as against aliens the plea is regarded with just suspicion.<sup>1</sup>

<sup>1</sup> The author had hoped, before going to press, to be able to refer to the decision in the case of *Ah Toy v. Musgrove*, recently decided by the Judicial Committee of the Privy Council. As, however, the official report of the decision has not yet appeared, he must content himself with saying, that the cabled messages respecting it seem to confirm the view, expressed above, that the plea of "act of state" may in some cases be used against aliens. The more important point, with respect to the general prerogative powers of Colonial Ministers, was not, apparently, decided.

### 3. JUDICIARY

#### CHAPTER XXXV

##### THE SUPREME COURT

WE have already discussed somewhat fully the constitution and powers of the Supreme Court, established by the Act of 1852,<sup>1</sup> and as these constitution and powers remain substantially unaltered by more recent legislation, it will be possible to deal with them briefly in this place.

The number of the judges of the Supreme Court has been increased to six (including the Chief-Justice), but the additional salaries thus necessitated have not been included in the Civil List, which is therefore inadequate to provide more than a part of the expenses of the staff. The balance is guaranteed by permanent appropriation under a colonial statute.<sup>2</sup> By a liberal construction of the 37th section of the Constitution Act, the judges of the Supreme Court are appointed by the Governor in Council, but their commissions are, by the 38th section, to run during good behaviour. As a question which is of no practical importance, but of some little theoretical interest, it appears that there are three ways by which a judge of the Supreme Court can be temporarily or permanently removed from office—

1. By Her Majesty, for misbehaviour. This power is implied in the grant of the commission, but under present circumstances it could hardly be exercised without raising great constitutional difficulties.
2. By the Governor, upon the address of both Houses of the Legislature (apparently without reason assigned).<sup>3</sup>

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<sup>1</sup> *Ante*, pp. 174-176.

<sup>2</sup> Supreme Court Act 1890, § 15.

<sup>3</sup> Constitution Act, § 38.

3. By the Governor in Council, as a temporary measure, until Her Majesty's pleasure be known, upon the wilful absence without reasonable cause, incapacity, or neglect on the part of the judge. (During such temporary suspension a *locum tenens* may be appointed by the Governor in Council).<sup>1</sup>

Moreover, a judge of the Supreme Court, *ipso facto*, vacates his office if he accepts any other office or place of profit in Victoria, unless granted to him under the royal sign-manual, or unless it be the office of judge of the Vice-Admiralty Court.<sup>2</sup> But a demise of the Crown does not affect his commission.<sup>3</sup>

The jurisdiction of the court remains as fixed by the Act of 1852, but the manner of its exercise has been modified in some important particulars. Practically the court now sits in the following capacities—

1. As the "Full Court," which must consist of at least three judges.<sup>4</sup> This court hears all appellate business, and business in the nature of appeals, as well as all trials at bar, and certain matters specially allotted to it.<sup>5</sup> It sits without a jury. The decision of the court is in accordance with the opinion of the majority, and, if the court is equally divided, the opinion of the Chief-Justice, or, if he be not present, of the senior judge present, decides the matter.<sup>6</sup>

2. As an Ordinary Court of First Instance, when it may be represented by a single judge in all cases, except those in which two or more judges are specially required by statute.<sup>7</sup>

In this capacity the Supreme Court sits, not only in Melbourne, but in eighteen other places specified by statute, and distributed amongst the six bailiwicks which now replace the old circuit districts. Strictly speaking, there are now no such things as "Assizes," with specially constituted Commissioners, but the judges of the Supreme Court hold sittings of the court in the various centres, on days appointed by the Governor in Council.<sup>8</sup> For the purposes of sheriff's business, the colony is divided into six bailiwicks, each with its sheriff,<sup>9</sup> but the central character of the jurisdiction of the Supreme Court is shown by the fact that all civil actions, except those for injury to im-

<sup>1</sup> Supreme Court Act 1890, §§ 13 and 14.

<sup>2</sup> § 16.

<sup>3</sup> Constitution Act, § 38.

<sup>4</sup> Supreme Court Act, 1890, § 3, and see, *e.g.*, the Marriage Act 1890, §§ 3, 102, 124, etc.

<sup>5</sup> § 36.

<sup>6</sup> §§ 38, 39.

<sup>7</sup> § 37.

<sup>8</sup> §§ 45, 54, 55.

<sup>9</sup> § 239.

movables, or in cases specially provided for by statute,<sup>1</sup> are transitory, *i.e.* non-local in their character.<sup>2</sup>

3. As a "Council of Judges," which must assemble at least once in every year on the summons of the Chief-Justice, and may be summoned at any time to an extraordinary meeting. The Council considers the operation of the Supreme Court Act<sup>3</sup> and the Rules of Court for the time being in force, and the working of the system of judicial machinery, and reports annually as to amendments which it deems advisable.<sup>4</sup>

4. As a Court for the making of rules of procedure. The authority of the Supreme Court in this, its legislative capacity, has been previously explained.<sup>5</sup>

Ordinary litigious procedure before the court is of two kinds, civil and criminal. Civil procedure, between subjects, is commenced by a writ of summons and conducted through pleading and trial to judgment and execution. A defendant may be arrested and held to bail on mesne process, if the plaintiff satisfies the court that there is reason to believe that he is about to withdraw from the jurisdiction, and that such withdrawal will tend to defeat the action.<sup>6</sup> After final judgment, a party ordered to pay money may be committed to prison for a term not exceeding six months, if, in the opinion of a judge, he has contracted the liability fraudulently or recklessly, or has neglected to satisfy the judgment though able to do so, and is about to leave the colony without payment, or to change his place of abode for the purpose of avoiding payment.<sup>7</sup>

In the criminal business of the Supreme Court, proceedings may commence by indictment, presentment, information, or (where a coroner has jurisdiction) by inquest.<sup>8</sup> But treason and misprisions of treason can be prosecuted by indictment

<sup>1</sup> *E.g.* Marriage Act 1890, § 103.

<sup>2</sup> Supreme Court Act 1890, § 41. The same rule applies also in many cases to criminal prosecutions (Crimes Act 1890, §§ 392-399).

<sup>3</sup> *Sic* in Supreme Court Act 1890, § 33, but ? whether the consolidated statute fairly represents the former law. <sup>4</sup> § 33.

<sup>5</sup> §§ 23 to 29. In addition to these functions, the members of the court sit in chambers to dispose of business of an administrative or routine character.

<sup>6</sup> Supreme Court Act 1890, §§ 110, 111.

<sup>7</sup> Imprisonment of Fraudulent Debtors Act 1890, §§ 3-13. Similar provisions obtain as to the judgments of County Courts (*ibid.* §§ 14-21). The limit of imprisonment is here four months.

<sup>8</sup> Crimes Act 1890, §§ 386, 390. These rules do not, of course, apply to offences punishable by summary jurisdiction.

only.<sup>1</sup> Indictment by a grand jury can, apparently, only be preferred upon the application of a law officer, except the alleged offender be a corporate body, or except it be sworn that there has been a miscarriage of justice.<sup>2</sup> A presentment is an accusation by a law officer or a Crown Prosecutor in his name, and may be preferred either to the Supreme Court or to General Sessions.<sup>3</sup> This is the usual method of bringing a prisoner to trial. An information is an accusation filed by the Attorney-General, or with his permission.<sup>4</sup> An inquest is the formal inquiry held by a coroner's jury in the case of sudden or suspicious death, or a destructive fire.<sup>5</sup> If a coroner's jury returns a verdict against a person, the coroner may commit him to custody, or, in cases of manslaughter, or arson,<sup>6</sup> may hold him to bail, and a coroner's commitment or bail after verdict is equivalent to that of a justice.<sup>7</sup>

No accused person may be charged any court fee in the conduct of his case.<sup>8</sup> Upon a plea of "not guilty" he is put upon his trial before a jury, and is entitled to be defended by counsel.<sup>9</sup> Moreover, it is the practice of the court to allow a prisoner, after a verdict of guilty has been pronounced, to make a personal statement in explanation or mitigation of his crime. But, after conviction for felony, the prisoner is *civiliter mortuus*, and can make no disposition of his property,<sup>10</sup> which vests in a curator appointed by the Governor in Council,<sup>11</sup> who, after payment of the costs of the prosecution, the convict's debts, and compensation to persons who have suffered by the criminal acts of the convict, may make an allowance for the support of the latter's wife and family, holding the balance for him upon his release.<sup>12</sup> No conviction or attainder for treason or felony now works any forfeiture or escheat.<sup>13</sup>

<sup>1</sup> Crimes Act 1890, § 386.

<sup>2</sup> § 389.

<sup>3</sup> § 388.

<sup>4</sup> § 390.

<sup>5</sup> Coroners Act 1890, § 4.

<sup>6</sup> § 12.

<sup>7</sup> § 15.

<sup>8</sup> Crimes Act 1890, § 446.

<sup>9</sup> § 447.

<sup>10</sup> § 550.

<sup>11</sup> § 552.

<sup>12</sup> §§ 555-560.

<sup>13</sup> § 544.

## CHAPTER XXXVI

### OTHER CENTRAL COURTS

TWO other courts having central, though somewhat special jurisdictions, require a word of notice. These are the Court of Insolvency, and the Vice-Admiralty Court.

The former is a court of record, having jurisdiction in and for Victoria. Within its proper scope it has the powers of the Supreme Court, and its judges sitting in chambers have the powers of judges of the Supreme Court acting in a similar capacity.<sup>1</sup> It has original jurisdiction in all matters of insolvency, except where expressly prohibited by statute.

The Governor in Council is entitled to appoint "a judge" of the Court of Insolvency, and all judges of county courts in Victoria are *ex-officio* judges of the court, subject however to the local limits of jurisdiction imposed upon them by the assignment of special districts.<sup>2</sup> So that the Court of Insolvency would appear to be a central court with local branches. An appeal from any order of the court lies to the Supreme Court.<sup>3</sup>

Proceedings are commenced by the presentation of a petition to the court, either voluntarily, by the insolvent himself or his representative, or, as a hostile step, by creditors upon the happening of certain events.<sup>4</sup> In the voluntary cases, the court, upon proof of the facts, makes an order vesting the estate of the petitioner in one of the official assignees of the court.<sup>5</sup> In contentious cases, the court makes a provisional order, or order *nisi*, contingent upon the alleged insolvent not showing cause within a certain time, and, in the interval, the

<sup>1</sup> Insolvency Act 1890, § 5.

<sup>3</sup> § 11.

<sup>4</sup> §§ 34 and 37.

<sup>2</sup> §§ 7 and 8.

<sup>5</sup> §§ 34 and 35.

court may place the estate under temporary sequestration.<sup>1</sup> When the order is made absolute, the estate, as in the voluntary cases, vests temporarily in an official of the court,<sup>2</sup> but the creditors are entitled to appoint a trustee and a committee of inspection, and upon confirmation of the appointment by the court, the property passes to the trustee.<sup>3</sup> The insolvent is bound to give up all his property except that which he holds as trustee, and the tools of his trade and necessary apparel and bedding of himself and family to an amount not exceeding £20.<sup>4</sup> The trustee or assignee realises the estate and distributes it amongst the creditors, having for this purpose large disciplinary powers over the insolvent. If the latter complies with the provisions of the law, and has not in the opinion of the court been guilty of causing his own insolvency by fraud or negligence, he may be granted his certificate of discharge, which will free him from all claims provable in his insolvency.<sup>5</sup>

Instead of adopting the process of the court, the creditors may accept a proposal for liquidation by arrangement, in which the estate is realised privately by the creditor's trustee, or they may accept at once a payment of a composition without realising the estate or divesting the insolvent of it.<sup>6</sup>

The Vice-Admiralty Court is an Imperial tribunal created by a statute of the year 1863,<sup>7</sup> which provides that upon any vacancy of the office of judge of a Vice-Admiralty Court in a British Possession becoming vacant, the Chief-Justice, or Principal Judicial Officer of such Possession, shall *ex officio* occupy it, with power to appoint, with the approval of the Governor, a registrar or marshal.<sup>8</sup> Before the passing of this statute it was usual to appoint a vice-admiralty judge for each colony by letters-patent under the seal of the High Court of Admiralty, and this power is still reserved by the statute.<sup>9</sup> By a later Act, the judge is empowered to appoint a deputy judge or judges, with deputy registrars and marshals, subject to the disallowance of the Admiralty, and the deputy judges may sit either with or apart from the judge, or in the same or other places, according to the discretion of the judge.<sup>10</sup>

<sup>1</sup> Insolvency Act, § 39. This power is also given to a judge of the Supreme Court, and, as a matter of fact, contentious business of this kind is usually disposed of by the Supreme Court.

<sup>2</sup> § 59.

<sup>3</sup> § 61.

<sup>4</sup> § 70.

<sup>5</sup> §§ 138-141.

<sup>6</sup> §§ 153-155.

<sup>7</sup> 26 & 27 Vic. c. 24.

<sup>8</sup> 26 & 27 Vic. c. 24, §§ 4 and 5.

<sup>9</sup> § 7.

<sup>10</sup> 30 & 31 Vic. c. 45, §§ 5-13.



The Court of Vice-Admiralty has jurisdiction in all claims for seaman's and master's wages, for services rendered to a ship, and for damage done by a ship, as well as for claims arising out of liens and mortgages on a ship. It also takes cognisance of all breaches of the Regulations of the Royal Navy, and of all matters arising out of droits of Admiralty.<sup>1</sup> As a general rule it is immaterial that the cause of action has arisen beyond the limits of the possession in which the court is established.<sup>2</sup>

The judge and officials of the Vice-Admiralty Court are paid by fees from time to time fixed by the Admiralty, and an appeal lies from a decision of the Vice-Admiralty Court to the Privy Council.<sup>3</sup> But no appeal can be brought after the expiration of six months from the decision complained of, nor can it be brought at all from any merely interlocutory order, except with the permission of the judge.<sup>4</sup>

[*Note.*—The reader is warned that the position of the Vice-Admiralty Court may at any moment be changed by the application to the colony of the Imperial statute 53 & 54 Vic. c. 27. But the statute expressly provides that its terms shall not extend to Victoria until they have been made specially applicable by Order in Council, and it is believed that no steps to obtain this Order have yet been taken.]

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<sup>1</sup> 26 & 27 Vic. §§ 10 and 11.

<sup>2</sup> § 13.

<sup>3</sup> § 22.

<sup>4</sup> 26 & 27 Vic. c. 24, § 22.

## B. LOCAL GOVERNMENT

### 1. LEGISLATURE

#### CHAPTER XXXVII

##### MUNICIPAL COUNCILS

IN the case of a community, such as England, which has been gradually formed by the coalescence of a number of formerly separate units, it is exceedingly difficult to give any coherent account of the state of local government. Some of the local organs date back to a time far older than the central government itself. Others have been gradually dovetailed into them in the course of centuries, till the result is a bewildering mosaic without unity or method. Such was, in fact, the case in England, until the statutes of the present century<sup>1</sup> made some attempt to reduce the chaos to order. Parishes, hundreds, municipalities, highway districts, petty sessional divisions, poor law unions, electoral districts, health districts, ridings, and other units of government lay huddled together in confusion, overlapping and rivalling one another.

Happily in the case of Victoria the materials are far simpler. In the true sense of the term, there never has been any local government in Victoria. That is, there has never been any local unit evolved spontaneously and independently of the central power. Every local authority is a creation either of the Imperial or the colonial legislature, and is a subordinate body deriving its existence from a higher source.

This fact has, naturally, produced a palpable unity in the system. Powers of government conferred upon local bodies

<sup>1</sup> *E.g.* the 5 & 6 Will. IV. c. 76 and 51 & 52 Vic. c. 41.

have from time to time been codified and arranged with a view to their working as a whole. Care has been taken to keep the hand of the central authority over all.

Putting aside for the present the judiciary aspect of local government, we may say that there are, practically speaking, two units of local administration, the municipality and the mining district. Others doubtless exist, and may in the future rise into great importance. The needs of irrigation and water supply, and the efforts made to satisfy them, may, in Victoria as in India, give birth to a widespreading system of local administration. At present the system is limited in its operation. Land districts also there are, but these tend to disappear as the Crown lands are disposed of, and the influence of the municipalities extends. "Vermin Districts," with powers of self-government, exist (as we have seen) in the Mallee Country, but their scope is limited. Counties and parishes are mere geographical expressions.

Of the two units which we have chosen for discussion, there can be no doubt that the municipality is infinitely the more important. Its scope is now almost universal, its powers are constantly being extended, while the scope and influence of the mining district tend to contract. We will, therefore, deal with municipal government first.

It will be remembered that we have brought our sketch of the developement of municipal government up to the year 1855.<sup>1</sup> In that year there existed a general system of local government in the urban districts, framed under the "Act for the establishment of Municipal Corporations."<sup>2</sup> This statute was slightly altered by two enactments<sup>3</sup> passed in the years 1856 and 1860 respectively, and from the latter we learn that at the time of its appearance fifty-six municipal districts had been created under the general Act.

Shortly afterwards the "Municipal Corporations Act 1863"<sup>4</sup> recast the scheme, by constituting the existing districts "original boroughs," and providing for the creation of new "boroughs," thus introducing that distinction of name between urban and rural municipality which has since been

<sup>1</sup> *Ante*, pp. 168-173.

<sup>2</sup> 18 Vic. No. 15.

<sup>3</sup> 19 Vic. No. 16 (excluding women from the municipal franchise), and 24 Vic. No. 114.

<sup>4</sup> 27 Vic. No. 184.

always retained. By this statute power was given to the Governor in Council to divide any borough, on its own petition, into "wards,"<sup>1</sup> and largely increased jurisdiction in such matters, for instance, as markets, slaughter-houses, baths, and refreshment licences, was conferred on the municipal authorities.<sup>2</sup>

Apparently the progress of developement under this statute was not very rapid, for we learn from the next enactment on the subject, the "Boroughs Statute" of 1869,<sup>3</sup> that only four new boroughs had been created under it. This new statute made certain alterations in the number of councillors, and rearranged the franchise. It also conferred the title of "Mayor" upon the chief magistrate of the borough. This enactment brings the history of urban municipalities down to the point at which they were united with the rural authorities in an uniform system.

We have seen<sup>4</sup> that, after repeated failures, local government in the rural districts had in 1855 got so far as the authorisation of voluntary "districts" charged with the making and maintenance of parish and cross roads and bridges, and working in subordination to a Central Road Board in Melbourne. We have seen also that the powers of the Central Road Board had been transferred to the Board of Land and Works in the year 1860.<sup>5</sup>

But the general policy of developement was continued by an important statute passed in the year 1863,<sup>6</sup> which, while repealing the Act of 1853, continued the existing Road Districts, and provided for the creation of new ones, under the corporate title of "District Board and Ratepayers." Each district was to be governed by a board, elected by ratepaying occupiers to the extent of £10 annual value. The districts had to make and maintain local roads and bridges, and to maintain such parts of the main roads as passed through their jurisdiction. They might also be called upon to construct main roads at the expense of the central government. To enable them to carry out these duties, they were empowered to pass by-laws, levy rates and tolls, and take land and materials upon payment of compensation.

<sup>1</sup> 27 Vic. No. 184, § 18.

<sup>2</sup> § 73, etc.

<sup>3</sup> 33 Vic. No. 359.

<sup>4</sup> *Ante*, p. 171.

<sup>5</sup> By the 23 Vic. No. 96.

<sup>6</sup> 27 Vic. No. 176.

By a most important part of the Act now under review, the Governor in Council was empowered to proclaim as a "shire" any Road District having an area of 100 square miles, and having paid a sum of £1000 under its last general rate. Such shire, when constituted, was to be governed by an elective council, with a president, and to be endowed with largely extended powers and duties, such as the regulation of pounds, slaughter-houses, and places of amusement, and the management of commons.<sup>1</sup> An important section<sup>2</sup> empowered the governor in council to adjust the boundaries of shires and districts to those of electoral districts.<sup>3</sup> It appears by a later statute that no less than 106 shires or road districts had been proclaimed under the various enactments we have enumerated, before the close of the year 1869.<sup>4</sup>

This later statute, the "Shires Statute" of 1869, provided for the gradual extension of the shire system throughout the rural districts of Victoria, by authorising the proclamation as a shire of *any* area, not comprised within the limits of a borough, containing rateable property capable of producing a sum of £100 upon a rate of one shilling in the pound, whenever an unopposed petition of fifty inhabitant ratepayers should desire it. The shires were to be incorporated as "the President, Councillors, and Ratepayers," and to be capable of subdivision into ridings, corresponding with the wards of a borough, and having the members of the Council equally apportioned amongst them. There was a provision for regular subsidies from the central government to each shire, during the first five years of its existence, in the proportion of twice the amount of rates locally levied on a given basis.<sup>5</sup> To the duties of the councils were added the control of the markets, the establishment of asylums, and others.<sup>6</sup> Finally, an enactment of the succeeding year<sup>7</sup> empowered the Governor, without waiting for a petition, to proclaim any Road District, of whatever area, whose rateable property should at the last general rate have stood at a net annual value of £12,000.

<sup>1</sup> 27 Vic. No. 176, §§ 279-329. Elaborate provision for commons had been made by the 25 Vic. No. 145, §§ 63-78.

<sup>2</sup> No. 284.

<sup>3</sup> Apparently there is now no identity between the two (cf. Local Government Act 1890, Sched. 2, and Constitution Act Amendment Act 1890, Sched. 17).

<sup>4</sup> 33 Vic. No. 353 (Sched. 1).

<sup>5</sup> 33 Vic. No. 353, § 266.

<sup>6</sup> *Ibid.* §§ 339-367.

<sup>7</sup> 34 Vic. No. 387.

This brings the history of municipal government down to the time of the great consolidating "Local Government Act 1874,"<sup>1</sup> which put rural and urban municipalities nearly on the same footing. As this statute, though frequently amended, is still the basis of the existing law, we may proceed to take an analytical survey of the present system.

Nearly the whole of Victoria is now covered by municipalities, and of municipalities there are practically two examples, boroughs and shires. There are at present 57 boroughs and 132 shires.<sup>2</sup> Any borough having a gross revenue of not less than £10,000 may be proclaimed a "town," and any borough having a gross revenue of not less than £20,000 a "city."<sup>3</sup> But towns and cities are by constitution "boroughs,"<sup>4</sup> and the distinction between them is mainly titular. The city of Melbourne and the town of Geelong are still, for the most part, governed by their special Acts, and do not, therefore, come within the operation of the general rules affecting municipalities.<sup>5</sup> The old "counties" and "pastoral districts" have no meaning so far as local government is concerned.

A borough, then, is an area so proclaimed, containing not more than 9 square miles, and having no point in it distant more than 6 miles from any other point, and containing at the time of proclamation a population of inhabitant householders not less than 300.<sup>6</sup> A shire is an area so proclaimed, containing, at the time of proclamation, rateable property capable of yielding, upon a rate not exceeding one shilling in the pound on the annual value thereof, a sum of £500.<sup>7</sup> The inhabitants of each borough and shire constitute a corporation by law, and are known as a "municipality."<sup>8</sup> The official title of the corporation of a borough or town is "Mayor, Councillors, and Burgesses," of that of a city, "Mayor, Councillors, and Citizens," of that of a shire, "President, Councillors, and Ratepayers."<sup>9</sup>

<sup>1</sup> 38 Vic. No. 506.

<sup>2</sup> Local Government Act 1890, Sched. 2.

<sup>3</sup> *Ibid.* § 14 (xi.-xii.)

<sup>4</sup> *Ibid.* § 54. "Cities" and "towns" have increased borrowing powers (cf. *post*).

<sup>5</sup> *Ibid.* § 5.

<sup>6</sup> Local Government Act 1890, § 14 (ii.) Apparently a borough whose inhabitant householders fall below the number of 300 cannot be dissolved on that account.

<sup>7</sup> *Ibid.* § 14 (i.)

<sup>8</sup> *Ibid.* § 4.

<sup>9</sup> *Ibid.* § 9.

The governing body of every municipality is a "Council," and all the acts of the council are deemed to be Acts of the municipality.<sup>1</sup> We will deal first with the constitution of a municipal council, and then examine its legislative functions.

A municipal council consists of the number of councillors fixed by the Order in Council creating the municipality, or by some subsequent Order.<sup>2</sup> Where the municipality has been created since 1874, its council consists of some multiple of three persons, not less than six nor more than twenty-four, if the municipality be undivided. If the municipality be subdivided into ridings or wards, the council consists of three members for each subdivision.<sup>3</sup> The actual number is usually nine.<sup>4</sup> But by increased subdivision of the municipality,<sup>5</sup> this number is necessarily enlarged.

Subject to certain exceptions, any person liable to be rated in respect of property of the annual value of £20 within the municipality may be a member of the council so long as he holds the qualification.<sup>6</sup> The following are the disqualifications.

1. Sex. No female is qualified to be a member.
2. Insolvency. No uncertificated and undischarged bankrupt or insolvent may be a member.
3. Attaint of treason or conviction of felony or infamous crime.
4. Mental incapacity.<sup>7</sup>
5. Holding of an office or place of profit under, or being interested in a contract with, the council.<sup>8</sup>
6. Failure to sign the declaration of office within two months after election.<sup>9</sup>

Any person who acts as a councillor whilst suffering from any of the above disabilities (except unsoundness of mind) or before signing the declaration, is liable for every offence to a penalty of £50. But the official acts of such a person are valid.<sup>10</sup>

One-third of the members of the municipal council or, in case of subdivision, one-third of the representatives of each subdivision, retire every year, but are eligible for re-election.<sup>11</sup>

<sup>1</sup> Local Government Act 1890, § 10.    <sup>2</sup> *Ibid.* § 14.    <sup>3</sup> *Ibid.* §§ 11 and 12.

<sup>4</sup> Hayter, *Victorian Year Book* 1890-91.

<sup>5</sup> Local Government Act 1890, §§ 12 and 14 (vii.)

<sup>6</sup> *Ibid.* § 49.

<sup>7</sup> *Ibid.* § 50.

<sup>8</sup> *Ibid.* § 51.

<sup>9</sup> *Ibid.* § 52.

<sup>10</sup> Local Government Act 1890, § 53. There is also a penalty for procuring or assisting in the nomination of an unqualified person as a candidate (§ 113).

<sup>11</sup> *Ibid.* § 54.

And extraordinary vacancies may occur in any of the following events—

- |   |                             |
|---|-----------------------------|
| 1. Death.   | } of any member of council. |
| 2. Resignation.   |                             |
| 3. Incapacity. <sup>1</sup>   |                             |
| 4. Ouster by the Supreme Court.   |                             |
| 5. Absence, without leave of the council, from four consecutive ordinary meetings. <sup>2</sup> |                             |

A councillor elected to fill an extraordinary vacancy is deemed, for purposes of retirement, to have been elected at the same time as the last occupant of his seat who was elected at an annual election.<sup>3</sup>

Every person of full age who on the 10th June in any year is liable to be rated in respect of any property within a municipality, and who has paid all his rates up to three months previously, is entitled to be enrolled upon the roll of municipal voters for that year. If such property, being in a borough, is rated at less than £50, or, in a shire, at less than £25, he obtains only one vote; if in a borough at between £50 and £100, or, in a shire, at between £25 and £75, he obtains two votes; if his rateable property amount to or exceed, in a borough £100, or in a shire £75, he obtains three votes. No one, except an occupier, can claim enrolment in respect of property worth less than £10 a year. In all cases where there is an occupant, he, and not the owner, is entitled to be enrolled in respect of the property.<sup>4</sup>

The municipal clerk makes out the municipal roll in the last week of June in each year, from the last rate books and the returns of the rate collectors.<sup>5</sup> The draft roll prepared by the municipal clerk is then open for inspection, and a revision court is held by the chairman and council to decide upon objections. At least three councillors, in addition to the chairman or his deputy, must be present.<sup>6</sup>

After all objections are heard and adjudged, the chairman

<sup>1</sup> (Kind not specified, see Local Government Act 1890, § 56).

<sup>2</sup> § 56.

<sup>3</sup> § 57.

<sup>4</sup> § 66.

<sup>5</sup> §§ 70, 71. It will be remembered that municipal rolls are used also for parliamentary elections. As non-payment of rates is no bar to the parliamentary franchise, the names of all defaulting ratepayers are kept on a separate voters' list (§ 66). But only such as are males can vote at parliamentary elections (Constitution Act Amendment Act 1890, §§ 45 and 185).

<sup>6</sup> Local Government Act 1890, § 74.



and at least two members of the council sign the list, which then becomes the municipal electoral roll for the year.<sup>1</sup> Elections are held annually on the second Thursday in August, to fill the vacancies caused by periodical retirements. Elections to fill extraordinary vacancies take place when required.<sup>2</sup> Where a municipality is subdivided, annual elections take place for each subdivision. Every one whose name is on the municipal roll is entitled to give the number of votes appearing there against his name.<sup>3</sup> The nomination of candidates is made to the returning officer, who, in the case of a municipality not subdivided, is the chairman of the council; where there are subdivisions the council or, failing them, the governor in council, appoint one of the existing councillors for the subdivision or some other person if no such councillor can act.<sup>4</sup> A nomination paper must be signed by ten duly qualified electors<sup>5</sup> and also, as an acceptance, by the candidate nominated. A deposit of £10 must also be made in each case,<sup>6</sup> and in case a candidate fails to poll one-fifth of the number of votes received by the successful candidate lowest on the poll, his deposit is applied by the returning officer towards the payment of official expenses.<sup>7</sup> A candidate may, however, retire, with the consent of five of his nominators, not later than four clear days before the day of polling,<sup>8</sup> and he is then entitled to have his deposit returned.<sup>9</sup>

In the event of a contest, the polling takes place on the day fixed by statute for the election.<sup>10</sup>

There is a polling place for each subdivision,<sup>11</sup> and the returning officer provides polling booths in such a proportion that not more than 600 voters can be called upon to vote at any one booth.<sup>12</sup> The voting begins at 8 A.M., and lasts, in the case of a shire, till 4 P.M., and, of a borough, till 5 P.M.<sup>13</sup> It is conducted by ballot, each ballot paper contains the names of all the candidates in alphabetical order, each voter receives as many ballot papers as he has votes, and strikes out the names of all those candidates for whom he does not wish to vote.<sup>14</sup>

<sup>1</sup> Local Government Act 1890, §§ 80, 81. The actual official roll is a printed copy signed by the municipal clerk and handed to the chairman.

<sup>2</sup> §§ 97, 100, and 101.

<sup>3</sup> § 105.

<sup>4</sup> § 108.

<sup>5</sup> § 110.

<sup>6</sup> § 111.

<sup>7</sup> § 138.

<sup>8</sup> § 119.

<sup>9</sup> § 138.

<sup>10</sup> § 118.

<sup>11</sup> §§ 116 and 135.

<sup>12</sup> § 117.

<sup>13</sup> § 118.

<sup>14</sup> §§ 118, 125, and 127.

Each ballot paper is marked on the back with the voter's number on the municipal roll,<sup>1</sup> and a person applying for a ballot paper may be asked certain questions to test his identity and the fact that he has not voted before.<sup>2</sup> After the poll has closed, the votes are counted by the returning officer, who declares the result, and forwards the papers sealed up to the municipal clerk, by whom they are kept secretly for six months, after which time they are destroyed in the presence of three councillors.<sup>3</sup> Disputes as to the validity of elections are decided by the Supreme Court.<sup>4</sup>

Having now considered the constitution of a municipal council, it is necessary for us to see how it can act. And, taking first the question of methods, we may notice the distinction between normal and abnormal methods, the latter being resorted to for business of special importance.

The council must hold an annual meeting at noon of the third Tuesday in each November at its office, and it may hold ordinary meetings at the same place at times fixed by itself. These ordinary meetings may be at stated intervals, in which case, after notice has once been given to members, they need not be reminded on each occasion.<sup>5</sup> But notice of special business, including the revocation or alteration of previous resolutions, must be given at the previous meeting, and sent to each councillor.<sup>6</sup>

At all meetings, unless it be specially provided to the contrary, all members present must vote. The voting is open, and a majority decides, the chairman having a casting as well as a substantive vote.<sup>7</sup> Nine members, or any smaller number forming an absolute majority of the council, are necessary for the transaction of business.<sup>8</sup> No councillor may vote upon or discuss any matter in which he has a pecuniary interest.<sup>9</sup> At the ordinary meetings the council sits with open doors.<sup>10</sup>

Special meetings may be summoned by the chairman or by any three councillors; two clear days' notice must be given

<sup>1</sup> Local Government Act 1890, § 126.

<sup>2</sup> §§ 128 and 129.

<sup>3</sup> §§ 130 and 131. Many of these elective rules apply also to Melbourne and Geelong (§§ 115, 121, and 140).

<sup>4</sup> §§ 165, 167.

<sup>5</sup> §§ 170, 177.

<sup>6</sup> §§ 176 and 177.

<sup>7</sup> § 171. In the case of a revocation of a previous resolution, unless the numbers present be greater than those at the meeting which passed the resolution, there must be a two-thirds majority (§ 177). <sup>8</sup> § 172. <sup>9</sup> § 173. <sup>10</sup> § 175.

in a borough, and four in a shire.<sup>1</sup> A "special order" can only be issued if passed at a meeting of which special notice has been given, and confirmed at a subsequent meeting, held not sooner than four weeks later, which has been advertised during the interval, once a week, in a local paper, and of which each councillor has received special notice.<sup>2</sup>

The council may appoint occasional or standing committees of itself, and may appoint a chairman and fix a quorum in each case.<sup>3</sup> It may also appoint an office either within the district, or, in case of a shire, within five miles of the boundary,<sup>4</sup> and it must require its clerk to attend there during stated hours for the conduct of business.<sup>5</sup> It must keep proper minutes of its own business and that of its committees; and these minutes are open to the inspection of councillors and creditors of the municipality.<sup>6</sup>

The legislation of a municipal council consists of by-laws, regulations, and joint-regulations.<sup>7</sup> By-laws and regulations are practically governed by the same rules, except that no regulation can impose a penalty.<sup>8</sup> A joint-regulation (except in special cases<sup>9</sup>) requires the active concurrence of at least two municipalities. Each by-law and regulation of a municipality must be passed by "special order" (above described) of the council, and sealed with the common seal of the municipality.<sup>10</sup> Each joint-regulation must go through a similar process in each municipality concerned in making it, except in cases in which the compulsory process is resorted to.<sup>11</sup> Notice of the proposed legislation must be published not less than seven days before the confirming meeting, and the legislation itself must be published in the *Government Gazette*.<sup>12</sup> When the process has been properly gone through, the by-law, regulation, or joint-regulation has the force of law throughout the municipalities concerned in making it, and takes effect from the date fixed by it for that purpose, or from the day succeeding publication.<sup>13</sup> But the operation of all municipal legislation is subject to certain restrictions.

<sup>1</sup> Local Government Act 1890, § 178.

<sup>2</sup> § 179.

<sup>3</sup> § 182.

<sup>4</sup> §§ 186 and 187.

<sup>5</sup> § 188.

<sup>6</sup> § 189.

<sup>7</sup> § 198.

<sup>8</sup> § 219.

<sup>9</sup> See note 11.

<sup>10</sup> § 199.

<sup>11</sup> § 200. If in certain cases municipalities refuse to concur, they may be held bound, with the approval of the Governor in Council, by a regulation made by a single municipality (§ 202).

<sup>12</sup> §§ 201 and 204.

<sup>13</sup> § 203.

1. It must not contain matter contrary to any "public law"<sup>1</sup> in force in Victoria.<sup>2</sup>
2. It may be repealed by the Governor in Council, by Order published in the *Government Gazette*.<sup>3</sup>
3. It may be quashed for illegality by the Supreme Court, upon the application of a resident ratepayer.<sup>4</sup>

Moreover, a by-law or regulation may be regularly repealed by a subsequent by-law of the same municipality, and a regulation by a subsequent regulation.<sup>5</sup> The repealing legislation must observe the rule as to majorities before noticed.<sup>6</sup> A joint-regulation may be repealed by a subsequent joint-regulation.<sup>7</sup>

The subjects upon which a municipal council may legislate by making by-laws are very numerous, and it is impossible here to do more than enumerate some of the most important. But it is worth noticing that such by-laws may be either of an original character, or they may be simply adoptions of a common form provided by the Local Government Act for certain cases.<sup>8</sup>

Taking first the cases in which the council may proceed directly to pass by-laws, we may enumerate the following subjects as coming within its jurisdiction.

1. The management of streets and footways, including very wide powers for the prevention of nuisances of all kinds.
2. The control and care of waterworks and drains.
3. The management of wharfs, jetties, and piers belonging solely to the council *and* not within the operation of any Act relating to ports and harbours.
4. The management of commons, public reserves, places of public recreation<sup>9</sup> or instruction, belonging to or placed under the control of the council.
5. The regulation of buildings, including the removal of dangerous structures.
6. The prevention of dangers from fire.
7. The suppression of nuisances (generally, and of various special kinds enumerated).
8. The carriage of passengers or goods by public conveyances, such as cabs, carts, and boats.

<sup>1</sup> *I.e.* (presumably) any law recognised by the Supreme Court, and affecting the colony generally.

<sup>2</sup> Local Government Act 1890, § 193.

<sup>3</sup> § 208.

<sup>4</sup> § 224.

<sup>5</sup> § 207.

<sup>6</sup> *R. v. Shire of Huntly*, 13 V. L. R., 606.

<sup>7</sup> Local Government Act 1890, § 207.

<sup>8</sup> § 191 (i. and ii.)

<sup>9</sup> The granting of liquor licences is within the jurisdiction of a specially constituted system of "licensing courts" (cf. Licensing Act 1890, §§ 49-54).

9. The conduct of the business of the council and its officers.
10. The conduct of public meetings and ratepayers.
11. The establishment and regulation of fairs, public sales, labour marts, and offices.
12. The supply and distribution of water from waterworks under the management of the council.
13. Sewerage and drainage.<sup>1</sup>
14. Lighting.
15. Public decency and public health.<sup>2</sup>
16. Quarrying and blasting operations.
17. Traffic and processions.<sup>3</sup>
18. The use of public baths and washhouses provided by the council.<sup>4</sup>
19. The control of markets provided by the council.<sup>5</sup>

Besides which the council have a general power of making by-laws for generally maintaining the good rule and government of the municipality.<sup>6</sup> But it is doubtful if this general power is worth very much.<sup>7</sup>

By way of indirect legislation, the council may pass by-laws adopting existing provisions on the subject of

- a. The matters enumerated as Nos. 1 to 9 *ante*, as subjects of direct legislation. (These provisions are contained in Schedule 8 of the Local Government Act 1890.)<sup>8</sup>
- b. Water supply. (Provisions contained in any Act of Parliament authorising their adoption.)<sup>9</sup>
- c. Any of the sections of Division I. of Part V. of the Water Act 1890.<sup>10</sup>

And the council of a *shire* may by any by-law extend to any part of its district any of the provisions of Part I. of the *Police Offences Act* 1890.<sup>11</sup>

Moreover any council may make regulations or join with other councils in making joint regulations authorised by any provisions adopted under *a (ante)*.<sup>12</sup>

<sup>1</sup> All public sewers and drains in a municipal district, and *all* sewers and drains in and under the streets thereof, whenever and however built, are vested in the municipality and placed under the entire control of the council (*Local Government Act* 1890, § 464).

<sup>2</sup> By § 16 of the *Health Act* 1890, the municipal council is practically made the local Board of Health for the municipality. In this capacity it is largely subject to the control of the Board of Public Health.

<sup>3</sup> § 191 and Sched. 13.      <sup>4</sup> § 480.      <sup>5</sup> § 510.      <sup>6</sup> § 191 (xix.)

<sup>7</sup> See *In re Council of Kyneton, Ex parte Gurner*, 1 W. and W. (L.) 11.

<sup>8</sup> *Local Government Act* 1890, § 191 (i.)

<sup>9</sup> § 191 (iv.) Sometimes these Acts empower direct legislation by the municipality (*e.g.* *Water Act* 1890, § 518).

<sup>10</sup> § 191 (ii.)

<sup>11</sup> § 190. These provisions are already in force in all boroughs (*ibid.*)

<sup>12</sup> § 192.

Finally, we have to see how the legislation of a municipal council is enforced.

Disobedience to any by-law, regulation, or joint-regulation of a municipal council or councils, lawfully made, is deemed an offence against the Local Government Act 1890,<sup>1</sup> and may be punished, in the absence of special provision, by fine in the discretion of the magistrate, not exceeding £20.<sup>2</sup>

And a by-law may also impose a penalty, or series of penalties, not exceeding £20<sup>3</sup> for any offence, or for any series of offences which practically constitute one act.<sup>4</sup> But an offender may not be prosecuted or punished for the same offence under the Local Government Act or municipal by-law and also under the Police Offences or Health Acts.<sup>5</sup> A document certified under the hand of a municipal clerk as a true copy of a by-law or regulation of his municipality or of a joint-regulation as affecting his municipality, is *prima facie* evidence of the fact.<sup>6</sup>

<sup>1</sup> Local Government Act 1890, §§ 218, 535.

<sup>2</sup> § 536. The penalty is recoverable before two justices (§ 537). Cf. also Police Offences Act 1890, § 99.

<sup>3</sup> Local Government Act 1890, § 217.

<sup>4</sup> *R. v. Shuter*, 8 V. L. R. (L.) 138.

<sup>5</sup> Local Government Act 1890, § 221.

<sup>6</sup> § 223.

## CHAPTER XXXVIII

### MINING DISTRICT BOARDS

THIRTY years ago, mining was the most important and popular industry in the colony. For some time past the popularity of the pursuit has been rapidly waning, until it is now estimated that less than 24,000 persons, of whom nearly one-sixth are Chinese, are engaged in it.<sup>1</sup> But its former importance has given the subject something more than a historical interest. So much government machinery was needed to organise the goldfields in the palmy days of the "fifties," that the subject has left a broad mark, which will not for many years be effaced, upon the government of Victoria.

The matter has two sides with which government is directly connected—the economic and the constitutional. The economic aspect is due mainly to the old feudal rule which gave the Crown the right to claim all precious metals found within its dominions, whether on private or public land. The doctrine was firmly established on the outbreak of the gold fever in Australia, and is the key to the history of the subject from a public point of view. The Crown has acted as landlord no less than as ruler, and this fact has given the mining legislation its economic aspect.

Putting aside this aspect, as not strictly within our province, and confining ourselves as much as possible to the constitutional side of the question, we proceed to sketch the mining system as a branch of local government.

<sup>1</sup> Report of the Mining Department for the quarter ending 30th June 1890, p. 47. The precarious character of mining pursuits may be estimated from the fact that the total returns do not average £100 a year for each individual engaged in it. This sum, which takes no account of interest on fixed capital, is less than the average wage of an unskilled labourer.

Mining Districts appear to date from the year 1855, when the Governor was empowered, with the advice of the Executive Council, to proclaim any goldfield as a district for the purpose of forming a local court.<sup>1</sup> There was no limitation as to number, but when the power was renewed by a statute of the year 1857, the number of goldfields was limited to six, unless upon the petition of the two Houses of Legislature.<sup>2</sup> By the Mining Statute of 1865<sup>3</sup> the limit was raised to seven, at which number it now remains,<sup>4</sup> the present mining districts of Ballaarat, Beechworth, Sandhurst, Maryborough, Castlemaine, Ararat, and Gippsland, containing a total area of 86,760 square miles.<sup>5</sup> A mining district may by proclamation be divided into any number of divisions.<sup>6</sup> The district of Beechworth contains eighteen, the others various smaller numbers.<sup>7</sup>

The legislative body of each mining district is its Board, which consists of ten members,<sup>8</sup> and to which four members are elected annually on the last Saturday in February, in place of the four senior members, who retire by rotation.<sup>9</sup> These members are distributed amongst the divisions of the district by proclamation, and receive remuneration out of a fund provided by the Consolidated Revenue.<sup>10</sup> Retiring members are re-eligible.<sup>11</sup>

Any male of the age of twenty-one years, the holder of a miner's right or business licence, and being a natural-born or naturalised subject of the Queen, resident within his division, may be elected a member of a mining board.<sup>12</sup> The qualification for an elector is the same.<sup>13</sup> But in each case the miner's right must have been held for at least three months.<sup>14</sup> There is no special roll of electors, but each voter produces his miner's right or business licence, and may be called upon to answer certain questions in proof of his qualification.<sup>15</sup> In each district there is a returning officer, appointed and removable by

<sup>1</sup> 18 Vic. No. 37, § 16.

<sup>2</sup> 21 Vic. No. 32, § 13.

<sup>3</sup> 29 Vic. No. 291, § 46.

<sup>4</sup> Mines Act 1890, § 80.

<sup>5</sup> Report of Mining Department for quarter ending 30th June 1890, p. 47.

<sup>6</sup> Mines Act 1890, § 80.

<sup>7</sup> Report, p. 47.

<sup>8</sup> Mines Act 1890, § 84.

<sup>9</sup> § 88.

<sup>10</sup> § 87.

<sup>11</sup> § 88.

<sup>12</sup> § 89.

<sup>13</sup> *Ibid.* A "miner's right" is a Crown permit, entitling the holder to take possession for purposes of mining and residence of a limited area of Crown land. A "business licence" empowers the holder to occupy a limited area of Crown land on a goldfield for purposes of residence and business (§§ 4, 5, 11, 12).

<sup>14</sup> § 90.

<sup>15</sup> §§ 96 and 97.



the Governor in Council.<sup>1</sup> A member of a mining board may, by letter to the returning officer, resign his seat.<sup>2</sup> He becomes disqualified for membership by the following events.

1. Failure to attend four consecutive meetings.
2. Insolvency.
3. Conviction of felony, perjury, or infamous offence.
4. Insanity.<sup>3</sup>

Each mining board must hold a meeting on the second Tuesday after a general election, and at such other times as it is convened by the chairman upon seven days' notice by advertisement in a local newspaper.<sup>4</sup> Five members form a quorum.<sup>5</sup> At the first meeting after a general election, it elects a chairman, who holds office until the corresponding meeting of next year, unless he dies or resigns in the meantime.<sup>6</sup> He has a casting, but not an ordinary vote.<sup>7</sup>

Each mining board may make by-laws, not affecting existing rights and liabilities, for the regulation of decision of disputed elections and the conduct of its own business, as well as for the settling of a large number of points arising in connection with the operation of mining and for prescribing the conduct of mining operations. It may also pass by-laws imposing rates upon land and machinery occupied or used for mining purposes.<sup>8</sup> All by-laws must be signed by members concurring therein, and sent to the law-officers of the Crown, who, if they are not contrary to law, certify and publish them in the *Government Gazette*. Twenty-one days after publication they come into operation, and have the force of law throughout the district, or that part of it to which they are made applicable.<sup>9</sup> But such by-law cannot prevent the operation of a municipal by-law, and any person, upon due notice advertised, may state his objections in writing to the law officers, who thereupon bring the matter before the Governor in Council, by whom the by-law in question may be revoked.<sup>10</sup> The proper court in which to enforce a by-law of a mining board is the court of the warden of the district, which has power to inflict a penalty of £10 for its breach.<sup>11</sup>

<sup>1</sup> Mines Act 1890, § 85.

<sup>2</sup> § 86.

<sup>3</sup> § 104.

<sup>4</sup> § 101.

<sup>5</sup> § 103.

<sup>6</sup> § 102.

<sup>7</sup> § 103.

<sup>8</sup> § 106. (The provisions are too technical to be stated in detail.)

<sup>9</sup> § 107.

<sup>10</sup> § 108.

<sup>11</sup> § 289.

## 2. EXECUTIVE

### CHAPTER XXXIX

#### MUNICIPAL AND MINING OFFICIALS

A MUNICIPAL council does much of its own executive business directly, just as the Legislative Assembly does. It may treat (subject to certain precautions) with the conductors of offensive works for their removal upon payment of compensation,<sup>1</sup> it may register dancing saloons,<sup>2</sup> may sell, purchase, and lease lands,<sup>3</sup> may borrow money for permanent works or the payment of its debts,<sup>4</sup> may enter into contracts for various purposes,<sup>5</sup> may take land compulsorily on payment of compensation,<sup>6</sup> may open, close, construct, manage, and alter streets, bridges, and other means of communication,<sup>7</sup> may construct and maintain sewers and drains,<sup>8</sup> may provide baths and wash-houses,<sup>9</sup> construct and establish markets,<sup>10</sup> and provide places of recreation and amusement.<sup>11</sup> All these functions, at least in their initial stages, must be performed by the council in its corporate capacity, and cannot be delegated to officials. But to conduct the routine business of the municipality, and carry its legislation into effect, certain officials are appointed by the council, some of whom are constitutional, *i.e.* contemplated by the general scheme of local government as essential to each municipality; the others are merely ministerial, appointed as convenience requires.

The first of these is the CHAIRMAN of the Council, who, in the case of a borough, is called the "Mayor," and, of a shire,

<sup>1</sup> Local Government Act 1890, §§ 226, 227.

<sup>4</sup> §§ 304-350.

<sup>8</sup> §§ 464-469.

<sup>5</sup> §§ 374-377.

<sup>9</sup> § 480.

<sup>2</sup> §§ 228-230.

<sup>6</sup> §§ 378-387.

<sup>10</sup> §§ 482-510.

<sup>3</sup> §§ 232-236.

<sup>7</sup> §§ 388-463.

<sup>11</sup> § 512.

the "President." The chairman is elected by the council, and holds office till the next annual election of the council, unless he has previously resigned, lost his seat on the council, or been ousted by the Supreme Court.<sup>1</sup> He presides at all meetings of the council, and takes precedence at all municipal proceedings within the district.<sup>2</sup> The council may, previously to the election of a chairman, vote an allowance to the office for the ensuing term, of an amount not exceeding three per cent of the gross income of the municipality for the year.<sup>3</sup> The president or mayor of a municipality is *ex officio* a justice of the peace for every bailiwick in which any part of his municipality is situated, and continues as such until twelve months after his vacation of office, provided he retains his qualification.<sup>4</sup> As we have seen, he has various duties with regard to the municipal roll, and the conduct of elections.<sup>5</sup>

A TREASURER must also be appointed by every council, and by him all monies payable to the municipality are received.<sup>6</sup> He must give security upon his appointment.<sup>7</sup> The mention of the treasurer naturally leads us to consider the nature of the revenue of a municipality.

In such revenue there are, broadly speaking, three great items—rates, endowments, and loans. It may be objected that loans are not really revenue,<sup>8</sup> inasmuch as they can only be raised for works of a permanent character, and have, of course, to be repaid. This is quite true, but it is convenient to treat of loans in the present place.

1. *Rates.* All land within a municipality, whether occupied or not, except that devoted to public, religious, or charitable purposes, or to mining,<sup>9</sup> is rateable property.<sup>10</sup> Its net annual value is assessed by valuers appointed by the council,<sup>11</sup> subject to an appeal within one month to the justices in petty sessions.<sup>12</sup> Upon this valuation the council must in every year levy a rate, known as the "General Rate," not exceeding half-a-crown and not less than sixpence in the pound,<sup>13</sup> which is primarily payable by the occupier, and, failing him, by the owner of each tenement.<sup>14</sup> But before making

<sup>1</sup> Local Government Act 1890, §§ 60, 61.

<sup>2</sup> §§ 62 and 64.

<sup>3</sup> § 65.

<sup>4</sup> Justices Act 1890, § 13.

<sup>5</sup> *Ante*, pp. 332, 333.

<sup>6</sup> Local Government Act 1890, §§ 141, 147.

<sup>7</sup> § 146.

<sup>8</sup> § 238. (Loans do not form part of "ordinary revenue," the "municipal fund," § 238.)

<sup>9</sup> *I.e.* mining on Crown lands (Local Government Act, 1890, § 24).

<sup>10</sup> § 246.

<sup>11</sup> § 248.

<sup>12</sup> § 276.

<sup>13</sup> § 256.

<sup>14</sup> §§ 257, 293.

such rate, the council must frame an estimate showing the necessity for it. And this estimate must be entered in the rate-book.<sup>1</sup> Where a municipality is subdivided, at least half the amount received in "general rates" during the year, deducting all payments made on account of loans, must be apportioned and expended among the subdivisions in proportion to the amount of their contributions.<sup>2</sup> Moreover the council may by "special order"<sup>3</sup> levy a "separate rate" upon a particular portion of the municipality, for the purpose of effecting a work which in its opinion will be for the special benefit of that portion, and this "separate rate" is payable only by the occupiers (or, failing them, the owners) in that portion,<sup>4</sup> and is treated as a separate fund for the special purpose for which it is levied.<sup>5</sup> And thirdly, a council may levy, in a similar way, "extra rates" upon any subdivision or subdivisions of its municipality, to be expended wholly upon such subdivision or subdivisions.<sup>6</sup> But such "extra rates" can only be made upon the request of the councillors for the subdivision,<sup>7</sup> and the total amount of "extra" and "general" rates for any one year upon any subdivision must not exceed half-a-crown in the pound on the net annual value of its rateable property.<sup>8</sup> The fund produced by "extra rates" is liable to a proportion of the general expenses of the municipality.<sup>9</sup>

All rates may be made for and payable at such periods as the council sees fit, but notice of the intention to levy a rate must be circulated in the neighbourhood one week previously to the levy.<sup>10</sup> A proposed rate must be fairly transcribed into the "rate-book," which, both before and after the levy, is open to the inspection of persons interested.<sup>11</sup> Appeal from the making of a rate lies to the general sessions of the bailiwick in which any part of the municipality is situated.<sup>12</sup> The court may amend the rate in respect of the appellant, or quash it *in toto*.<sup>13</sup>

The payment of rates may be enforced by—

- a. Proceedings before any justice or by "action of debt" in any court having jurisdiction.<sup>14</sup> (An occupier or owner parting with his interest before the expiration of the period for which the rate is levied is liable only for a proportionate amount.<sup>15</sup>)
- b. Taking possession of the property rated, and leasing it to provide for payment. This remedy cannot be adopted till rates are in arrear for five years. Unless the property is released by payment of arrears within thirty years, it vests absolutely in the municipality.<sup>16</sup>

<sup>1</sup> Local Government Act 1890, § 259.

<sup>2</sup> § 242.

<sup>3</sup> § 260.

<sup>4</sup> §§ 260, 261.

<sup>5</sup> § 262.

<sup>6</sup> §§ 263, 268.

<sup>7</sup> § 264.

<sup>8</sup> § 266.

<sup>9</sup> § 267.

<sup>10</sup> § 271.

<sup>11</sup> §§ 272, 273.

<sup>12</sup> § 277. (Apparently if the appellant objects only to the amount assessed upon his property he may appeal to petty sessions, § 276.)

<sup>13</sup> §§ 278, 279.

<sup>14</sup> § 288. (If the action of "debt" still exists.)

<sup>15</sup> § 292.

<sup>16</sup> §§ 297-303.

2. *Endowment.* Whenever any monies are voted out of the consolidated fund of the colony for the endowment of municipalities, they are payable in the following way. Each borough receives a sum equivalent to and each shire a sum double of the amount received by it in "general" rates during the previous year, upon a maximum basis of a shilling rate. But no borough is to receive in any year an endowment of more than £2000. If the sum voted by Parliament will not suffice to pay these amounts, each municipality bears a proportionate reduction.<sup>1</sup> The endowment is payable in equal moieties in the months of March and September,<sup>2</sup> but before the 31st of January in any year succeeding that in which endowment has been received, the council must forward to the treasurer of the colony a statement (verified by the solemn declaration of its treasurer or clerk) showing the expenditure of such endowment, and also a statement containing full particulars of its rating assessment and receipts.<sup>3</sup>
3. *Loans.* The council of a municipality may borrow money upon the municipal credit for two purposes only, viz.,
  - a. The construction of permanent works.<sup>4</sup>
  - b. The repayment of the principal of previous loans.<sup>5</sup>

Every loan must be raised by debentures of the municipality payable to bearer, under the seal of the municipality, and signed by the chairman, clerk, and treasurer of the municipality.<sup>6</sup> The total amount which the council may borrow for permanent works is limited to ten times the average income of the municipality from general rates, on a maximum basis of one shilling and sixpence in the pound, for a period of three years next preceding the notice for a loan.<sup>7</sup> The total amount which it may borrow for the repayment of outstanding loans is limited to the principal owing thereupon,<sup>8</sup> deducting the amount of any sinking fund set aside towards the repayment thereof.<sup>9</sup> Any councillors who concur in raising a loan beyond the statutory limits become personally liable for its repayment, and cannot recoup themselves out of the municipal funds.

Notice of intention to raise any loan must be published by the council for one month before the adoption of the proposition, and such notice must specify the purposes for which the loan is sought. If it is for works, it must state that the plans, specifications, and estimates can be seen at the municipal offices.<sup>10</sup> Any twenty persons on the municipal roll may obtain a *plébiscite* upon

<sup>1</sup> Local Government Act 1890, §§ 351, 352.

<sup>2</sup> § 397.

<sup>3</sup> §§ 354, 358.

<sup>4</sup> A list of "permanent works" is given in § 311. They include the improvement of streets and bridges, and the construction of sewers, waterworks, gas-works, municipal offices, markets, baths, hospitals, asylums, etc.

<sup>5</sup> § 305.

<sup>6</sup> §§ 312-317. Each debenture must contain various particulars concerning the loan.

<sup>7</sup> §§ 306 and 309. A "city" has further powers (§ 349).

<sup>8</sup> § 306.

<sup>9</sup> § 310.

<sup>10</sup> § 320.

the question, conducted, as nearly as may be, in the manner of a municipal election.<sup>1</sup> If there is no opposition, or the *plebiscite* approves, the council proceeds to authorise the loan by "special order,"<sup>2</sup> and debentures are issued.<sup>3</sup> No loan must be for a longer period than thirty years.<sup>4</sup> And the council must at once commence the annual investment of a sum not less than two per cent of the amount of the loan in Victorian Government stock, to form a sinking fund for its repayment. This fund stands in the joint names of the treasurer of the colony and the municipality in question, the interest accruing from it is added to the capital sum, and when the debentures fall due, it is applied towards their repayment.<sup>5</sup> If the council is able to repurchase its debentures, it is entitled to withdraw so much of the sinking fund as, in the opinion of the Commissioners of Audit, will leave enough to meet the outstanding liability.<sup>6</sup> The holders of debentures under different loans rank in order of time priority against the general assets of the municipality, but each sinking fund is primarily applicable to the discharge of its own loan.<sup>7</sup> A receiver of the rates of a municipality may be appointed by the Supreme Court on the petition of a debenture holder whose principal or interest is unpaid.<sup>8</sup> Municipal creditors have, of course, no claim on the consolidated fund of the colony.<sup>9</sup>

Besides these three great items, there are many miscellaneous incomings to a "municipal fund," such as tolls, fines for breaches of by-laws, payments for use of municipal property, and the like. All monies coming to the municipality, and amounting to the sum of £20, must be paid into a bank within seventy-two hours after their receipt, or within such shorter time as the council may direct.<sup>10</sup> In addition to the ordinary items of expenditure, a municipal council is expressly authorised to expend its funds upon—

- a. Expenses of obtaining Acts of Parliament.<sup>11</sup>
- b. Repurchase of its own debentures.<sup>12</sup>
- c. Expenses of preparing parliamentary municipal rolls.<sup>13</sup>

Each municipality has also a MUNICIPAL CLERK, appointed by the council, who, in the case of a borough, is called the

<sup>1</sup> Local Government Act 1890, §§ 321-325.

<sup>2</sup> In this case the confirming order requires the sanction of an absolute majority of the council. And if the loan is for works which will necessitate the compulsory taking of land, the order for the works must receive the sanction of the Minister (§ 327).

<sup>3</sup> § 328.

<sup>4</sup> § 318.

<sup>5</sup> §§ 330, 331.

<sup>6</sup> § 332.

<sup>7</sup> §§ 337, 344.

<sup>8</sup> § 338.

<sup>9</sup> § 346.

<sup>10</sup> § 241.

<sup>11</sup> § 239.

<sup>12</sup> § 245.

<sup>13</sup> § 240.

"town clerk," in that of a shire, the "shire secretary."<sup>1</sup> The municipal clerk is, in effect, the chief literary official of the municipality. His duties are too numerous to detail. They include, amongst others, the signature of new and the destruction of repurchased debentures,<sup>2</sup> the attestation of accounts sent up to the central government,<sup>3</sup> the preparation of the municipal roll,<sup>4</sup> and the representation of the council in legal proceedings.<sup>5</sup>

Each municipal council also appoints a SURVEYOR, whose duties are mainly concerned with the construction and maintenance of municipal works, and the administration of the immovable property of the municipality. No person can be appointed surveyor or engineer to a municipality unless he holds an official certificate of his qualification as a Surveyor of Land and Works, and a special body, the "Municipal Surveyors' Board," exists to grant certificates of competency or qualification.<sup>6</sup>

In addition to these necessary officials, a municipal council may appoint valuers, collectors, health officers, inspectors, and other officers necessary to the performance of its duties.<sup>7</sup> All officers employed by a municipal council must render accounts at times prescribed by the council,<sup>8</sup> they must, if entrusted with money, give security for their fidelity,<sup>9</sup> and they are forbidden, on pain of forfeiture of office and a penalty of £100 recoverable at the suit of a common informer, to exact or accept any fees other than their official salary, or to have any interest in a bargain or contract made by the council.<sup>10</sup>

But besides these officials appointed by the council, every municipality has one or more important officials, known as AUDITORS, who are directly elected by the ratepayers. Their election takes place annually, at the same time as the annual election of councillors, and in the same way, except that the auditor or auditors of a municipality is or are elected from the whole constituency, irrespective of subdivisions.<sup>11</sup> Moreover, in addition to the elected auditors, the Governor in Council may appoint an auditor for any municipality.<sup>12</sup> The remuneration of the auditors is paid out of the municipal fund, but is fixed by the Governor in Council.<sup>13</sup> The accounts of a municipality

<sup>1</sup> Local Government Act 1890, §§ 141 and 142.

<sup>2</sup> § 314.

<sup>3</sup> § 356.

<sup>4</sup> § 70.

<sup>5</sup> §§ 519-524.

<sup>6</sup> §§ 151-158.

<sup>7</sup> § 141.

<sup>8</sup> § 148.

<sup>9</sup> § 146.

<sup>10</sup> § 145.

<sup>11</sup> §§ 160-162.

<sup>12</sup> § 163.

<sup>13</sup> § 164.

must be balanced to the 30th September in each year, and after being audited in the presence of the parties interested, must be published and lie open for inspection.<sup>1</sup> As finally settled, they are passed by the council at its ordinary meeting, on which occasion ratepayers and creditors of the municipality are entitled to be present, but not to take part in the proceedings.<sup>2</sup> Upon the request of 20 ratepayers, accompanied by a deposit of £50, the Governor in Council may direct a "special audit" by specially appointed auditors. Such special auditors report to the Minister, and if their report is unfavourable, the specified items may be disallowed with costs out of the municipal fund.<sup>3</sup>

With regard to mining officials there is not very much to be said. The Governor in Council is empowered to appoint such officers and for such districts and divisions as he shall think fit, for the making of inspections and surveys and registration of claims and mines, and for such other purposes as may be required.<sup>4</sup> Under this authority, the following officials are usually appointed for a mining district.

1. The **WARDEN**, who is the executive head of the district, and also acts in many cases in a judicial capacity. He receives and decides upon the due formalities of applications for mining leases and licences,<sup>5</sup> and hears objections to their reception,<sup>6</sup> he appoints persons to assist him as assessors in his judicial capacity,<sup>7</sup> inspects disputed "claims,"<sup>8</sup> authorises entry on claims to view alleged encroachments,<sup>9</sup> conducts the inquiries necessary before a lease of mining rights is granted over private property,<sup>10</sup> and orders contributions towards the cost of pumping machinery by the owners of claims benefited thereby.<sup>11</sup> In his judicial capacity he has a general jurisdiction to hear such matters as are cognisable by the Court of Mines of his district, as well as claims to the possession of Crown land under a licence, and debts alleged to be due under mining partnerships or under the provisions of the *Mines Act* 1890 (where no other remedy is provided).<sup>12</sup> He may also grant injunctions in cases of urgent necessity,<sup>13</sup> and for disobedience to his orders (other than for payment of money) he may commit to prison.<sup>14</sup> But his jurisdiction in debt or contract is limited to £100,<sup>15</sup> and an appeal in most cases lies from his decision to the

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<sup>1</sup> Local Government Act 1890, §§ 360-363.

<sup>2</sup> § 364, and see *Rippon v. Denis*, 6 V. L. R. (L.) 81.

<sup>3</sup> §§ 366-372.

<sup>4</sup> Mines Act 1890, § 80.

<sup>5</sup> § 65.

<sup>6</sup> § 66.

<sup>7</sup> § 228.

<sup>8</sup> § 233.

<sup>9</sup> § 244.

<sup>10</sup> § 306 and Schedule 33.

<sup>11</sup> § 378.

<sup>12</sup> § 216. See also § 310.

<sup>13</sup> § 246.

<sup>14</sup> § 249.

<sup>15</sup> § 216.



Court of Mines of the district.<sup>1</sup> When either of the parties demands it, or the warden himself thinks it expedient, he is assisted by four expert assessors.<sup>2</sup>

2. The **WARDEN'S CLERK**, who acts as the warden's representative in formal business.<sup>3</sup>
  3. The **MINING REGISTRAR**, who acts under the direction of the Mines Department in the compiling of information and supply of statistics, and under the by-laws of the Board of the District in the registration of claims, residence areas, and other particulars of the mining industry.<sup>4</sup>
  4. The **MINING SURVEYOR**, who is not exclusively occupied in official business, but who, under the direction of the Mines Department and the District Boards, does certain surveying work for which he is entitled to certain fees.<sup>5</sup> For example, he makes a survey whenever an application is made for permission to mine on private property.<sup>6</sup>
  5. The **INSPECTOR OF MINES**, who, when authorised by the Minister or by a police magistrate, or upon the complaint of a miner working therein, must inspect any mine, together with its machinery, to see that the provisions of the Mines Act relative to the safety of miners are being complied with.<sup>7</sup> Moreover, the mining manager of any mine in which an accident attended with serious injury to any person has happened, must give notice to the local inspector within twenty-four hours, under penalty of a fine of £50.<sup>8</sup>
- Besides these officials appointed by the Governor in Council, every Mining Board is entitled to appoint such officials for the inspection of channels, enforcement of by-laws, and collection of rates as it may think fit.<sup>9</sup> But, as a matter of fact, this power is very rarely, if ever, acted upon.<sup>10</sup>

<sup>1</sup> Mines Act 1890, § 254.

<sup>2</sup> § 229.

<sup>3</sup> § 220.

<sup>4</sup> Cf. *c.g.* § 32.

<sup>5</sup> Schedule 33, Appendix B.

<sup>6</sup> Schedule 33, Regs. 6-10.

<sup>7</sup> § 367.

<sup>8</sup> § 370, 376.

<sup>9</sup> § 109.

<sup>10</sup> For many of the details in the last part of this chapter, which it is almost impossible to obtain from documentary sources, I am indebted to the kindness of A. W. Howitt, Esq., F.R.S., Secretary for Mines in the colony of Victoria.

### 3. JUDICIARY

#### CHAPTER XL

##### COUNTY COURTS

IN examining the local administration of justice, we shall have to discuss three items,—county courts, magistrates' courts, and courts of mines. We will begin with county courts, but we shall see ultimately that there is a substantial connection between all three.

County courts are the modern successors of the old Courts of Requests, established for the decision of small civil cases, principally relating to recovery of debts. We have seen these introduced into New South Wales proper, and their extension to Port Phillip.<sup>1</sup> Soon after separation, they were abolished to make way for the new system,<sup>2</sup> which has been since amplified in many directions.<sup>3</sup>

County courts are from time to time established and held at places proclaimed by the Governor in Council.<sup>4</sup> Strictly speaking, each court has jurisdiction throughout the whole of Victoria; but if, on the hearing of a common law plaint, it appears that the defendant does not reside, and that the cause of action did not arise within 100 miles of the court, or that the defendant resides at least 10 miles nearer to some other court (the cause of action not arising nearer the court chosen than such other court), the defendant is entitled, as a matter of right, to a non-suit.<sup>5</sup>

<sup>1</sup> *Ante*, p. 30.

<sup>2</sup> By 16 Vic. No. 11.

<sup>3</sup> Cf. *e.g.* 21 Vic. No. 29, 28 Vic. No. 261 ("County Courts Statute 1865") 33 Vic. No. 345 ("County Courts Statute 1869"), 40 Vic. No. 556, 50 Vic. No. 907, 51 Vic. No. 942, etc. <sup>4</sup> County Court Act, 1890, §§ 3 and 7. <sup>5</sup> § 5.

Not more than nine barristers or advocates of seven years' practice may be appointed by the Governor in Council to be judges of county courts in Victoria.<sup>1</sup> Such judges hold office during good behaviour. The Governor may remove them for absence from Victoria without leave, for incapacity, and upon the Address of both Houses of the Legislature.<sup>2</sup> Each judge presides over such courts as may be assigned to him by the Governor in Council, but his jurisdiction runs throughout the colony.<sup>3</sup> A county court judge may not practise at the bar, nor sit in Parliament,<sup>4</sup> and he may be compelled to reside within his district.<sup>5</sup>

In addition to the judge, there are appointed for each county court one or more registrars, who may appoint deputies to act for them in cases of emergency, and one or more bailiffs (removable by the judge for inability or misbehaviour), with power to appoint assistants by writing under their hands.<sup>6</sup> The registrar's duties are, briefly, to conduct the administrative business of the court, especially the proceedings prior to the hearing. He issues and receives all process, decides on points of practice, administers oaths, receives fees and other monies, prepares lists of causes for trial, and registers orders and judgments.<sup>7</sup> Assistant registrars may be appointed at places at which no courts are held, to conduct preliminary process.<sup>8</sup> The duties of the bailiff are, briefly, to execute the process of the court, by serving notices and summonses, enforcing warrants, and levying executions.<sup>9</sup> Officers of the court must not be concerned for any party in any proceeding before it, and registrars and bailiffs must not perform one another's duties.<sup>10</sup> Both registrar and bailiff give security for the due performance of their functions.<sup>11</sup> Any registrar, assistant, or deputy proceeded against for any act done in obedience to a warrant issued by him may plead the warrant and the judgment upon which it is founded as a justification; in similar cases, the bailiff or his servants may justify under the warrant alone.<sup>12</sup> And all actions brought against any person for anything done under

<sup>1</sup> County Court Act 1890, § 9.

<sup>2</sup> § 10.

<sup>3</sup> § 12.

<sup>4</sup> § 14. There seems to be no restriction upon his accepting any other office. He is not within the provisions of the Public Service Act (see Public Service Act 1890, § 3).

<sup>5</sup> § 24.

<sup>6</sup> §§ 25, 26, 33.

<sup>7</sup> § 31.

<sup>8</sup> §§ 27 and 28.

<sup>9</sup> § 34.

<sup>10</sup> § 36.

<sup>11</sup> § 38.

<sup>12</sup> § 40.

the County Court Act must be commenced within six calendar months after the commission of the act complained of.<sup>1</sup> All constables and police officers must aid in the execution of county court process.<sup>2</sup>

Subject to the limits of locality previously mentioned, the jurisdiction of a county court extends to the following cases—

1. All personal actions where the amount, value, or damages sought to be recovered do not exceed £500.<sup>3</sup>
2. All actions of replevin where the goods seized do not exceed in value £500. (The action must be brought in the court nearest to which the goods are situate.)<sup>4</sup>
3. All actions of ejectment in which the value of the premises, the possession whereof is sought to be recovered, does not exceed £50 a year, or where the rent (exclusive of ground rent) does not exceed that sum.<sup>5</sup>
4. All suits for account, administration, execution of trusts, foreclosure or redemption of mortgages, specific performance of agreements for sale, purchase, or lease, appointment of guardians to or maintenance or advancement of infants, and dissolution or winding up of partnerships or companies, where the property in question does not exceed in amount or value the sum of £500.<sup>6</sup>
5. All such actions of tort as may be remitted by the Supreme Court upon the affidavit of the defendant that the plaintiff has no visible means of support.<sup>7</sup>

But no county court may try any action for—

1. Seduction,
2. Breach of promise of marriage,
3. Decision of title to a toll, fair, or franchise,

unless—

1. The parties have consented in writing to the jurisdiction,<sup>8</sup> or
2. The case has been remitted by the Supreme Court.<sup>9</sup>

The Supreme Court has power, within certain limits, to order a transfer from the county court to the Supreme Court, in cases where it shall consider the latter the preferable tribunal.<sup>10</sup>

A judgment in the county court is enforceable by execution against the goods of the judgment debtor,<sup>11</sup> by attachment of debts due to him, and by charge on stock or shares standing in his name, of which he is beneficial owner, and even by

<sup>1</sup> County Court Act 1890, § 41.    <sup>2</sup> § 43.    <sup>3</sup> § 48.    <sup>4</sup> § 118.    <sup>5</sup> § 119.

<sup>6</sup> § 121. The court has power to entertain proceedings for injunction in all cases otherwise falling within its jurisdiction.    <sup>7</sup> § 51.

<sup>8</sup> § 48.

<sup>9</sup> § 51.

<sup>10</sup> §§ 52 and 123.

<sup>11</sup> § 99. (There is a reservation of wearing apparel and tools of trade up to £10.)

arrest of the debtor's person.<sup>1</sup> The bailiff of one county court is bound to enforce the warrant of another,<sup>2</sup> and a county court judgment may be registered in the Supreme Court and execution issued thereupon.<sup>3</sup> But an appeal lies from a judgment, decree, or order (not being an order of commitment) of a county court to the Supreme Court by special case or motion, provided that the point be raised within a limited time, and a deposit paid to cover costs.<sup>4</sup> The Supreme Court may affirm or reverse the decision appealed from, or order a rehearing before itself.<sup>5</sup> A county court judge may also reserve any question for the decision of the Supreme Court.<sup>6</sup>

Judgments of county or other local courts of record in any other Australasian colony may now be enforced in Victoria, provided that, upon adoption of a reciprocal policy, the Governor in Council has made a proclamation to that effect.<sup>7</sup>

It must be remembered that county courts are also, practically, local Courts of Insolvency (cf. *ante*, p. 322).

<sup>1</sup> County Court Act 1890, §§ 107, 108, 115, and 117.

<sup>2</sup> § 101.    <sup>3</sup> § 104.

<sup>4</sup> §§ 133, 134.

<sup>5</sup> § 133.

<sup>6</sup> § 135.

<sup>7</sup> §§ 137-145.

## CHAPTER XLI

### MAGISTRATES' COURTS

THE specific title of every magistrate in Victoria is "justice of the peace." Many of the justices have other offices, of a more important character, which influence their powers as justices, but, in order that they may act in a magisterial capacity, they are specially invested with the title. It is generally known that the office of "justice of the peace" is very ancient. It goes back beyond question to the fourteenth century, and there are traces of similar offices at a still earlier date. As the powers of the autonomous local authorities disappeared in England, their places were gradually taken by these officials, until the whole character of the local administration was changed. For it has always been a distinguishing feature of the office that it has been created by the Central Government, whereas the older local authorities were created by the localities. Every justice of the peace holds his office from and at the pleasure of the Crown. Another remarkable feature of the office is, that from early times, though not from its commencement, it has been of an honorary character. The overwhelming importance of the justices in local administration dates from the time of the Tudors and the Reformation.

Justices of the Peace in Victoria are of two kinds—

a. Specially appointed.

b. *Ex officio*.

a. In every bailiwick<sup>1</sup> such and so many justices as are necessary are "assigned" by Commission under the seal of the Colony to keep the peace.<sup>2</sup> The Commission is in the Queen's

<sup>1</sup> For bailiwicks cf. Supreme Court Act 1890, §§ 41 and 42, and Sched. 3.

<sup>2</sup> Justices Act 1890, § 12.

name and is signed by the Governor.<sup>1</sup> Justices thus specially appointed have jurisdiction only in their own bailiwicks. At present there are in Victoria between two and three thousand of such justices.<sup>2</sup>

b. The following persons are *ex officio* justices of the peace—

- |   |  |
|---|--|
| 1. Members of the Executive Council,                            | } for every bailiwick.   |
| 2. Judges of the Supreme Court,                                 |  |
| 3. Chairmen of General Sessions,                                |  |
| 4. Coroners and deputy coroners,                                |  |
| 5. Police magistrates,  |  |
| 6. The president of every shire and the mayor of every borough, | } for every bailiwick in which any part of their municipality is situate, during their terms of office, and twelve months afterwards. <sup>3</sup> |
| 7. The mayors and mayors elect of Melbourne and Geelong,        |  |

No insolvent is capable of acting as a justice, and the Governor in Council may prohibit any justice from acting.<sup>4</sup>

The duties of justices are now so numerous and important that it will be impossible to give more than a brief outline of them. The simplest way will be to note the different capacities in which a justice may act, and shortly touch upon his duties in each.

Broadly speaking, a justice acts in three capacities—

- a. As a magistrate out of sessions.
- b. As a magistrate or judge in petty sessions.
- c. As a magistrate or judge in general sessions.

a. The great function of a justice out of sessions is to receive information of the commission of offences, and to prepare the cases for trial.

Having heard information, either by mere statement or oath, which raises in his mind a reasonable probability of an offence having been committed, he issues a summons calling on the accused to appear and answer the charge, or, if the information has been on oath and an indictable offence is charged,<sup>5</sup> he may issue a warrant ordering his immediate arrest.<sup>6</sup> If the accused does not obey the summons, a warrant may also be issued after sworn proof of service.<sup>7</sup> A justice may compel the attendance of witnesses, and the production of documents.<sup>8</sup>

<sup>1</sup> Justices Act 1890, Sched. 3 (form).

<sup>2</sup> *Ex relations* the Crown Office.

<sup>3</sup> Justices Act 1890, §§ 13 and 14.

<sup>4</sup> §§ 15 and 16.

<sup>5</sup> §§ 19 and 32.

<sup>6</sup> § 30.

<sup>7</sup> § 32 (3).

<sup>8</sup> § 29 (3).

During the preliminary hearing, the witnesses for the prosecution are examined on oath, they may be cross-examined by the accused or his counsel, and their depositions are taken down by the justice and signed by them.<sup>1</sup> Such examination is not a judicial proceeding, and the justice may, if he thinks fit, exclude the public;<sup>2</sup> but if the evidence, in the opinion of the justice, raises a *prima facie* case against the accused, the latter must be allowed to call witnesses for the defence, whose depositions are similarly taken.<sup>3</sup> Before hearing the accused's witnesses, however, the justice, if he thinks there is a case, must ask the prisoner if he wishes to make a statement. But the question is accompanied by an elaborate caution as to the effect of such a statement, and the accused is not bound to say anything.<sup>4</sup> If he does so, his statement is treated in the same way as the depositions of the witnesses.<sup>5</sup>

If the justice, after these steps, makes up his mind to commit the prisoner for trial, he forwards the information and depositions to the Crown Solicitor (if the trial is to take place in the Supreme Court) or to the clerk of the peace for the bailiwick (if the trial is to be at general sessions).<sup>6</sup> The witnesses for the prosecution may be, and the material witnesses for the prisoner (except mere witnesses to character) must be, bound by recognisance to appear and give evidence at the trial.<sup>7</sup> If the proceedings require adjournment at any stage, the justice may (subject to certain restrictions) remand the accused to custody,<sup>8</sup> but he may at any stage, even after committal for trial, take bail for his reappearance, except upon a charge of treason.<sup>9</sup> The powers previously enumerated may be exercised by a single justice or by two or more in conjunction.<sup>10</sup>

Besides these functions as committing magistrate, a justice of the peace may be called upon to perform an almost countless number of acts of a purely administrative character. He may, in conjunction with another justice, order the destruction of an injured or diseased animal,<sup>11</sup> commit a neglected child to

<sup>1</sup> Justices Act 1890, § 39.<sup>2</sup> § 40.<sup>3</sup> § 44.<sup>4</sup> § 43.<sup>5</sup> *Ibid.*<sup>6</sup> § 56.<sup>7</sup> §§ 45, 46.<sup>8</sup> § 50.<sup>9</sup> §§ 29 (6) and 51. The power to admit to bail extends even to the case of a person found guilty by a coroner's jury of manslaughter or arson (Coroners Act 1890, § 12).<sup>10</sup> § 29.<sup>11</sup> Animals Act 1890, § 15, and Stock Diseases Act 1890, § 70.



the care of the Department for Neglected Children or of a private person,<sup>1</sup> order a husband to pay money for the support of his deserted wife,<sup>2</sup> visit and examine gaols,<sup>3</sup> decide, in certain cases, as to where bridges over drainage works are necessary,<sup>4</sup> apprentice orphan or deserted children,<sup>5</sup> order the return of any seaman who has deserted from a foreign vessel,<sup>6</sup> direct a search for runaways on the complaint of the master of such vessel,<sup>7</sup> command the dispersion of an unlawful assembly,<sup>8</sup> or arrest a person suspected of being a foreign criminal.<sup>9</sup>

*b.* As a judge or magistrate in Petty Sessions. A court of Petty Sessions is an open court, constituted by two or more justices, a single police magistrate,<sup>10</sup> or (where the parties consent in writing), a single justice.<sup>11</sup> Courts of petty sessions are held at places and times fixed by the Governor in Council.<sup>12</sup> At present there are about 240 of such places in Victoria.<sup>13</sup>

Every Court of Petty Sessions has a clerk attached to it, whose duty it is to keep the register of the proceedings of the Court, and conduct its formal business.<sup>14</sup>

Besides the powers conferred on it by special statutes, a Court of Petty Sessions has jurisdiction in the following cases—

1. Offences made punishable on summary conviction.
2. All cases of assault where the damages claimed do not exceed £50.
3. Claims for the restitution of goods alleged to be illegally detained, where the value of the goods does not exceed £50.
4. Actions for "civil debts recoverable summarily," where the sum claimed does not exceed £50. (Under the head of "civil debts recoverable summarily" are specified a large number of cases which do not, as a rule, involve much dispute as to facts.)
5. Enforcement of fines and penalties recoverable before one or more justices, where no special provision is otherwise made for their enforcement.<sup>15</sup>

<sup>1</sup> Neglected Children's Act 1890, §§ 20 and 63.

<sup>2</sup> Marriage Act 1890, § 43.

<sup>3</sup> Gaols Act 1890, § 19.

<sup>4</sup> Water Act 1890, § 72.

<sup>5</sup> Master and Apprentices Act 1890, §§ 6 and 11.

<sup>6</sup> Seamen's Act 1890, § 6.

<sup>7</sup> *Ibid.* § 9.

<sup>8</sup> Unlawful Assemblies and Processions Act 1890, § 6.

<sup>9</sup> Crimes Act 1890, § 370.

<sup>10</sup> A police magistrate is an official under the Public Service Act, having special qualifications (Public Service Act 1890, § 9). No special statutory power is needed for the creation of the office (*Ex parte Hargraves* 1 A. J. R. 23). A police magistrate alone may, as a rule, do whatever two justices are authorised to do (Justices Act 1890, § 63). There are at present twenty-three police magistrates in Victoria (*Year Book of Australia* 1890, p. 613).

<sup>11</sup> Justices Act 1890, § 58.

<sup>12</sup> § 62. <sup>13</sup> *Year Book of Australia* 1890, p. 609.

<sup>14</sup> Justices Act 1890, §§ 64, 65.

<sup>15</sup> § 59.

But the following cases are expressly excluded from its jurisdiction—

1. Civil cases in which a county court has not cognisance for the same cause.<sup>1</sup>
2. Cases involving title to land.<sup>2</sup>

Procedure is by information and summons,<sup>3</sup> and the order of the court may be enforced by warrant of distress or commitment issued by a single justice,<sup>4</sup> or by an attachment of debts,<sup>5</sup> except that a warrant of commitment cannot issue to enforce a "civil debt recoverable summarily."<sup>6</sup> But in all matters involving the payment of a fine of £5 or damages for assault or for trespass by cattle, or involving immediate or contingent imprisonment, an appeal lies from the Court of Petty Sessions to the next practicable court of General Sessions of the Peace.<sup>7</sup> And, after notice of such appeal, by consent of the parties and an order of a judge of the Supreme Court, a case may be stated for the opinion of the Supreme Court, the parties agreeing that a judgment in accordance with such opinion shall subsequently be entered at the sessions.<sup>8</sup> A judge of the Supreme Court may also, on the application of any person injured by a summary conviction or by any order or warrant of a court of petty sessions or a justice, issue an "order to review," calling on the other parties and (if he shall think fit) the justice or justices involved, to show cause why the proceeding should not be reviewed.<sup>9</sup> An appeal lies from the refusal of a single judge to the Full Court,<sup>10</sup> and, in any case, the return of the order takes place before the Full Court, which may confirm, quash, or vary the proceeding complained of.<sup>11</sup> The justices whose decision is questioned may file explanatory affidavits.<sup>12</sup>

c. As a judge or magistrate in General Sessions. There is a court of General Sessions of the Peace, which corresponds with Quarter Sessions in England,<sup>13</sup> for every bailiwick, and sessions are held at twenty-eight places provided by statute,<sup>14</sup> at times directed by the Governor in Council.<sup>15</sup> To each court of General Sessions is attached an official, known as the "clerk of the

<sup>1</sup> Cf. *ante*, p. 351.

<sup>4</sup> § 90.

<sup>5</sup> § 116.

<sup>6</sup> § 141.

<sup>13</sup> § 174.

<sup>10</sup> § 142.

<sup>2</sup> Justices Act 1890, § 69.

<sup>6</sup> § 59 (4).

<sup>11</sup> § 146.

<sup>14</sup> Sched. 4.

<sup>3</sup> § 73.

<sup>8</sup> § 137.

<sup>7</sup> § 127.

<sup>12</sup> §§ 149, 150.

<sup>15</sup> § 176.

peace," appointed by the Governor in Council, who issues process, arraigns prisoners, records verdicts, judgments, and proceedings, enters appeals, files convictions, and generally conducts the ministerial business of the court.<sup>1</sup>

The only essential member of the Court of General Sessions is the chairman, who is a specially qualified official appointed by the Governor in Council; but any one or more ordinary justices having jurisdiction within the bailiwick in which the court is held, may sit with him.<sup>2</sup> In civil matters, the court may hear all appeals, and take cognisance of all matters cognisable by the appellate jurisdiction of courts of general and quarter sessions in England.<sup>3</sup> In its criminal capacity, it may try all indictable offences within its bailiwick, except about twenty from the more serious classes of crimes.<sup>4</sup> Criminal trials at General Sessions are held before juries of twelve.<sup>5</sup>

Finally, we may notice the special protection extended to magistrates and their officials in the discharge of their duty.

Every action brought against a justice for any act done in the execution of his duty, may be met by a plea of "not guilty by statute," and if, after such a plea, the plaintiff fails to prove that the act was done maliciously *and* without reasonable and probable cause, judgment must be given for the defendant.<sup>6</sup> But even if the act complained of was irregular, the complainant must first proceed to have it quashed by General Sessions or the Supreme Court,<sup>7</sup> his action must be commenced within six months after the act complained of,<sup>8</sup> and before commencing it he must give one month's notice in writing to the defendant, stating the ground upon which he intends to bring the action.<sup>9</sup> Moreover, such action can only be brought in the Supreme Court, and the defendant may tender amends before action or pay money into court after action commenced, and if the plaintiff does not recover more than the sum tendered or paid in, he is mulcted in costs.<sup>10</sup> Similar provisions apply to actions against any officers of General Sessions, except that an action against a clerk of the peace must be commenced within four months after the happening of the cause of action.<sup>11</sup>

These special provisions, moderate as they are, form one

<sup>1</sup> Justices Act 1890, §§ 181, 182.

<sup>2</sup> §§ 178, 179.

<sup>3</sup> § 178.

<sup>4</sup> § 179.

<sup>5</sup> Juries Act 1890, § 37.

<sup>6</sup> Justices Act 1890, § 155.

<sup>7</sup> § 157.

<sup>8</sup> § 164.

<sup>9</sup> *Ibid.*

<sup>10</sup> § 166.

<sup>11</sup> §§ 164, 171-173.

of the most important exceptions to the widely-accepted rule of English Constitutional Law, that a government official is liable for the consequences of his unlawful acts in precisely the same way as a private citizen. They are admitted, doubtless, out of consideration for the honorary character of the office of justice, and the extreme difficulty of mastering the whole of its duties.



## CHAPTER XLII

### COURTS OF MINES

“WITHIN and for” every Mining District there is a Court of Mines, which is held at such times and places as are appointed by the Governor in Council.<sup>1</sup> Judges of County Courts are *ex officio* judges of all Courts of Mines in Victoria,<sup>2</sup> and, as a matter of fact, Courts of Mines are generally held on the same days and at the same places as County Courts.<sup>3</sup> Owing to the peculiar wording of the legislation on the subject, it is somewhat difficult to pronounce whether Courts of Mines are strictly local courts, but there can be little doubt that a Court of Mines is primarily intended to confine itself to matters arising within its own district.<sup>4</sup> It is, however, expressly provided that a judge of such a Court may sit outside its territorial limits.<sup>5</sup>

Besides its judge, each Court of Mines has its clerk, with assistant and deputies, who issue process and keep accounts of the court fees, and generally act under the direction of the judge, and also a bailiff and his deputies, who attend the sittings of the Court, and serve and execute its process.<sup>6</sup> Each clerk and bailiff gives security for the performance of his duties, and the functions of clerk and bailiff may not be performed by the same person.<sup>7</sup> Clerks and bailiffs of Courts of Mines are protected against vexatious proceedings in the same way as registrars and bailiffs of County Courts.<sup>8</sup>

Apart from the question of locality, the jurisdiction of a Court of Mines extends generally to all questions and disputes

<sup>1</sup> Mines Act 1890, § 115.

<sup>2</sup> County Court Act 1890, § 11.

<sup>3</sup> *Year Book of Australia* 1890, p. 604.

<sup>4</sup> Mines Act 1890. Compare §§ 135 and 310, etc.

<sup>5</sup> § 118.

<sup>6</sup> §§ 120-126.

<sup>7</sup> §§ 127, 128.

<sup>8</sup> § 129. *Ante*, p. 350.

of law or equity arising between miners in relation to mining on Crown Lands, and particularly to questions concerning—

1. Claims by virtue of miners' rights or licences to the user of Crown Land or the user or sale of water thereon.
2. Trespass to or ouster of such claims.
3. Contracts and partnerships for the conduct of mining operations on Crown Lands.
4. Mortgages or charges of mining property.
5. Boundaries of mining property.<sup>1</sup>

Moreover, it has jurisdiction to award compensation to owners of private property whose lands have been claimed for mining purposes.<sup>2</sup>

Within the scope of its jurisdiction, a Court of Mines acts both as a Court of First Instance and as a Court of Appeal from the Warden of the District.<sup>3</sup> But where in an action of debt or contract which could have been brought in the Warden's Court, the plaintiff does not recover more than £100, he cannot recover more than the costs which would have been payable in the Warden's Court, unless the judge of the Court of Mines issues a special certificate.<sup>4</sup> Subject to this limitation, however, a Court of Mines has, when acting within its jurisdiction, all the powers of the Supreme Court in analogous cases, including the power to grant a warrant of possession.<sup>5</sup> But the form of proceedings is similar to that in use in the County Court, except that in all cases either of the parties, as well as the judge, may require the trial of any question of fact by a jury of six assessors.<sup>6</sup>

The decree or order of a Court of Mines is enforced by execution against the property,<sup>7</sup> and any person failing to pay money directed by it may be summoned and examined as to his assets, with liability to imprisonment if he fail to attend.<sup>8</sup> Moreover, the Court may grant injunctions, appoint managers of undertakings, and provisional guardians of lunatics against whom it is desired to take proceedings.<sup>9</sup> And bailiffs of Courts of Mines must execute the decisions of Wardens, duly certified to them.<sup>10</sup>

Finally, an appeal lies from the decision of a Court of

<sup>1</sup> Mines Act 1890, § 135.

<sup>2</sup> § 311.

<sup>3</sup> § 254. For the powers of this official, cf. *ante*, pp. 347, 348.

<sup>4</sup> Mines Act 1890, § 218.

<sup>5</sup> § 135.

<sup>6</sup> § 172.

<sup>7</sup> § 183. <sup>8</sup> §§ 185, 186.

<sup>9</sup> §§ 175, 198, 205.

<sup>10</sup> § 242.

Mines to the Full Supreme Court, either by way of special case stated by the judge himself, or by way of substantial appeal from his decision.<sup>1</sup> But unless the proceeding is an appeal from an order of the Court of Mines granting a rehearing before itself (which it is competent to make<sup>2</sup>) the appellant must give security for the costs of the appeal.<sup>3</sup> The Full Court may either affirm, reverse, or vary the decision appealed from, or may direct a rehearing before the Supreme Court,<sup>4</sup> and in either case the result is transmitted to the clerk of the Court from which the appeal is brought, and is binding on it.<sup>5</sup>

<sup>1</sup> Mines Act 1890, §§ 209, 210.

<sup>3</sup> § 210.

<sup>2</sup> § 207, 208.

<sup>4</sup> § 211.

<sup>5</sup> § 213.

## CHAPTER XLIII

### ON THE LEGAL RELATIONS BETWEEN THE CENTRAL AND LOCAL GOVERNMENTS

HARDLY less important than a clear understanding of the distinction between central and local government, is a knowledge of the links which bind the two together. For the balance of power, which gives so much of its character to the tone of governmental functions as a whole, is decided almost as much by the nature of these relations as by the comparative strength of the two authorities.

In Victoria, it is not difficult to trace the nature of these links. In every important point the relation between the central and local authorities is that of master and servant. Hence the overwhelming power of central machinery, and the overwhelming importance of the seat of central government. In the earlier chapters of this book, we have seen how it was that the scheme of government in Victoria naturally assumed this aspect. We have now to notice how it is practically exemplified at the present day.

There are three principal ways by which the central government acts upon a local authority; viz., by control of local legislation, by appointment of local officials, and by disposal of public funds.

In the first place we have noticed<sup>1</sup> that a municipal by-law may be repealed, without reason assigned, by order of the Governor in Council, that is, by the executive authority of the central government. This power of the Governor in Council extends not only to cases in which the municipal legislature

<sup>1</sup> *Ante*, p. 335.



has exceeded its powers in passing the by-law, but also to cases in which the central authority differs from the local in a matter within the legitimate scope of the latter's action. But in the former class of cases, where the municipal legislation is clearly illegal, the initiative may also be taken by a private person, without waiting for an actual case. And the central judicial authority, the Supreme Court, may declare the legislation in question to be illegal and null.

The example of the mining boards is still clearer. For here no enactment of the local authority is even *prima facie* binding until it has been certified as legal by an officer of the central authority; and, even when fully in action, a mining by-law may be revoked by the Governor in Council, upon the application of an objector.

And of course it is perfectly lawful for the central authority, by the exercise of its own legislative power, not merely to alter and repeal all local legislation, but even to abolish or reform the local authority itself. Doubtless there was once a time, in England, when such a claim on the part of the central authority would have been met by a plea of *ultra vires*. But the time for that plea has long since passed, even in England. And it has never existed in Victoria. From the very beginning of Victorian history, local authorities have been the creatures of and controlled by the central legislature.

Secondly, the central government controls the local by the appointment of officials. It is true that municipal officials are, for the most part, appointed by the councils, or elected by the ratepayers, the principal exception to this rule being in the case of the auditors who are appointed by the Governor in Council to audit the municipal accounts. But even in the case of the locally appointed officials, the central authority reserves the power of deciding upon the legality of their appointments, and in some instances of pronouncing upon their professional capabilities.<sup>1</sup>

And, as we have just seen, the officials of the mining districts are almost wholly appointed and paid by the central government, and are, therefore, primarily accountable to the central authority for their actions. Their tenure being the ordinary official tenure, in the event of their acting in accord-

<sup>1</sup> *Ante*, p. 346.

ance with the wish of the local in opposition to that of the central authority, they can be dismissed by the latter.

In the department of local judiciary, the influence of the central authority is even more abundantly clear. There are no municipal courts of justice, as there are in England. Every judge, every magistrate, who dispenses justice in the districts, is directly appointed by the central power, with the single exception of the chairmen of the municipalities; and when it is remembered that a single ordinary justice cannot act judicially without the consent of the parties, it will be understood that even the local administration of justice is in the hands of the central power. Nor is it unimportant to remember that the agents of justice, the police force, are entirely a central body.

But finally, it is perhaps in the matter of public monies that the central authority keeps the most effective control over the localities. The local authorities have always looked to the government at Melbourne for pecuniary assistance. From the days when it was attempted to force District Councils into existence by a promise of a share in the Crown Land Revenue, down to the wholesale endowment of municipalities in 1874, there has been a uniform system of subsidising which has at length grown into a habit. But no less marked than the fact itself has been the manner of its treatment. The municipalities have not been invested with the unalienated land within their limits, nor with the revenue from forests, rivers, or mines within their districts. It is true that they have been empowered to tax their constituents, and to borrow money on their property. But a municipality which relies entirely upon its ordinary revenue is still a rarity, and the endowment which it obtains from the central authority is given in the most paternal way, by cash subsidy dependent upon the happening of certain conditions, as may be seen by any one who chooses to read the annual Appropriation Acts.<sup>1</sup> Doubtless there have been good reasons for this practice, but its influence upon the municipalities has been very marked, in a want of public spirit, an absence of sense of responsibility, a hungering after a division of the spoil, and a feeling of dependence upon the central authority. It is, however, as the prime cause of the last effect, that we have to notice it here.

<sup>1</sup> The expenditure of the Railway Fund, of course, also acts in the same way.

## CHAPTER XLIV

### ATTEMPTS TOWARDS A FEDERAL UNION

WE have seen that when the colony of Victoria was first constituted, by separation from New South Wales, there was a definite attempt by the Colonial Office to establish a federal executive for Australia, in spite of the fact that the Imperial Parliament had deliberately refused to create a federal legislature. We have seen that this attempt came to nothing, although traces of it remained until the year 1861. We have seen also that no attempt was made by the Imperial or the Victorian legislature to revive the subject on the grant of Responsible Government to the Australian colonies in 1855.

But the matter was taken up with considerable energy by the colonies themselves shortly after the latter date, and a brief outline of the more important stages in the progress of the movement, which has to a certain extent become law, may here be given.

On the 16th January 1857, Mr. Gavan Duffy moved in the Legislative Assembly of Victoria for the appointment of a committee to consider and report upon the necessity for a federal union of the Australian colonies for *legislative* purposes.<sup>1</sup> After eight months, the committee presented a report,<sup>2</sup> which recommended that the colonies of New South Wales, South Australia, and Tasmania should be invited to send delegates to a conference which should settle all preliminary questions as to the line of action.<sup>3</sup> On the very day that this report was presented, viz. the 9th September 1857, the Governor laid on the table of the Assembly a despatch from the Secretary of

<sup>1</sup> *V. and P. of Leg. Ass.*, 1856-57, sub date.

<sup>2</sup> *Ibid.* vol. iii. p. 141.

<sup>3</sup> *Ibid.* 9th September 1857.

State for the Colonies, enclosing copies of correspondence which showed that influential Australians in England were urging the Imperial Government to take up the matter once more.<sup>1</sup> Thus encouraged, both Houses of the Victorian Legislature agreed to the recommendations of the committee's report,<sup>2</sup> and early in the following session it was announced that New South Wales and South Australia had definitely given in their adhesion to the scheme,<sup>3</sup> whilst Tasmania, two months later, forwarded an equally decided assent.<sup>4</sup>

Shortly after these events, viz. in the year 1859,<sup>5</sup> the new colony of Queensland was created by separation from New South Wales, and the need for federal union became increasingly evident. On the 3d May 1860, the Legislative Assembly of Victoria, acting on the report of a new committee, recommended that the new colony be invited to join in the arrangements,<sup>6</sup> and before the close of the year the invitation had been cordially accepted by the Queensland government.<sup>7</sup> In the year 1862, a communication was received from Tasmania, to the effect that the Tasmanian delegates to the conference had been actually appointed,<sup>8</sup> and thereupon both Houses of the Victorian legislature agreed to communicate with the other colonies, with a view of securing a general nomination of representatives.<sup>9</sup>

But here the matter seems to have halted, until, in the first session of 1870, a new committee was appointed, again on the motion of Mr. Duffy, who had been persistent in his efforts to secure consideration of the subject.<sup>10</sup> The committee had barely time to recommend the appointment of a Royal Commission, when the session came to an end.<sup>11</sup> The suggestion was however adopted, and in the second session the Commission presented a report which recommended permissive legislation,

<sup>1</sup> Copies in *V. and P. (L. A.)*, 1856-57, vol. iv. p. 1385.

<sup>2</sup> *Ibid.* 15th September and 17th November 1857.

<sup>3</sup> Copies of correspondence in *V. and P. (L. A.)*, 1857-58, vol. i. p. 661.

<sup>4</sup> *Ibid.* i. 395.

<sup>5</sup> By Letters-Patent and Order in Council of 6th June 1859, confirmed by Imperial Statute, 24 & 25 Vic. c. 44.

<sup>6</sup> *V. and P. (L. A.)* 1859-60, 3d May.

<sup>7</sup> Copy correspondence in *V. and P. (L. A.)*, 1860-61, vol. i. p. 561.

<sup>8</sup> Copy in *ibid.* 1861-62, vol. i. p. 779.

<sup>9</sup> *Ibid.* 17th June 1862.

<sup>10</sup> *V. and P. (L. A.)*, 1870, 1st Session, 2d June.

<sup>11</sup> Copy Report in *ibid.* vol. i. p. 855.

enabling such colonies as might think fit to do so, to enter into arrangements for concerted action. The majority of the commissioners also made a somewhat startling suggestion, to the effect that each colony should be allowed to exercise treaty-making powers on its own behalf.<sup>1</sup>

Conferences on various topics of intercolonial interest were from time to time held, subsequently to this date. One conference which sat in Melbourne in the year 1880, comprised representatives from New South Wales, Victoria, and South Australia, and discussed a large number of important subjects, including an uniform tariff, a general Australian Court of Appeal, and the immigration of Chinese.<sup>2</sup> On its adjournment to Sydney, the conference was strengthened by the adhesion of the colonies of Queensland, Tasmania, Western Australia, and New Zealand.<sup>3</sup> The adjourned conference then agreed to the form of bills for the establishment of an Australasian Court of Appeal, and for the execution of intercolonial warrants of apprehension.<sup>4</sup> New South Wales and Victoria also agreed (with exception of details) on one Bill to restrict the influx of Chinese,<sup>5</sup> and four other colonies to another,<sup>6</sup> for the same purpose. And all the colonies, except Western Australia, agreed to a strong protest against the action of the government of that colony in encouraging Chinese immigration.<sup>7</sup> But the Imperial Government declined to interfere with the action of Western Australia,<sup>8</sup> and the conference itself failed to agree upon the terms of a Federal Council Bill.<sup>9</sup>

At last, however, a convention which met in Sydney at the close of the year 1883, and in which all the seven colonies of the Australasian group were represented,<sup>10</sup> succeeded in producing definite results. The immediate incentives to the meeting were the apprehended designs of the French Republic in the New Hebrides, and the action of the Queensland Government in opposition to them. But although much interest was dis-

<sup>1</sup> Copy in *V. and P. (L. A.)*, 1870, 2d Sess., vol. ii. p. 467.

<sup>2</sup> *V. and P. (L. A.)*, 1880-81, vol. iv. p. 293 (Minutes).

<sup>3</sup> *Ibid.* p. 417 (Minutes).

<sup>4</sup> *Ibid.* pp. 439-449.

<sup>5</sup> *Ibid.* p. 451.

<sup>6</sup> *V. and P. (L. A.)*, 1880-81, vol. iv. p. 455.

<sup>7</sup> *Ibid.* p. 477 (copy).

<sup>8</sup> *V. and P. (L. A.)*, 1881, vol. ii. p. 317.

<sup>9</sup> *V. and P. (L. A.)*, 1880-81, vol. iv. p. 459.

<sup>10</sup> Sir William des Vœux, governor of Fiji and High Commissioner of the Western Pacific, was also admitted at his own request. (*Report of the Australasian Convention of 1883*, p. 3.)

played in this question, and resolutions upon the subject were arrived at, the chief importance of the convention for our immediate purpose is that it agreed to the terms of a Federal Council Bill, which, with some alteration, ultimately became the law of the Empire.<sup>1</sup> More than eighteen months elapsed before this result was accomplished, but in August 1885 the "Federal Council of Australasia Act 1885" received the Royal Assent.<sup>2</sup>

In its terms it is a purely permissive measure. It provides that there shall be a Federal Council, so soon as four of the Australasian colonies shall have agreed to join it in manner provided by the Act.<sup>3</sup> But the joining of any colony is entirely within its own option, and a colony which has once joined may withdraw, though remaining subject to the federal legislation which affected it as a member of the Council, until such legislation is altered or repealed by the Council itself.<sup>4</sup> Each self-governing member of the group is entitled to send two representatives, each Crown colony one.<sup>5</sup> The manner of choosing and the tenure of representatives is left entirely to the legislature of the colony in each case.<sup>6</sup>

When once constituted, the Council must sit at least once in every two years, being summoned by the Governor of the Colony in which it has itself decided to hold its next session.<sup>7</sup> But special sessions may be called at any time upon the request of the Governors of three colonies, to deal with matters specially mentioned in the convening proclamation.<sup>8</sup> The Council is competent to proceed to business if a majority of the whole number of its members, representing a majority of the colonies with respect to which the Act is in operation, are present, notwithstanding any vacancy in the representation of a colony.<sup>9</sup> Questions are decided by the votes of members taken *virilim*, the president, who is elected each session, having an ordinary (as well as a casting) vote.<sup>10</sup>

<sup>1</sup> The chief alterations are in §§ 20 (addition) and 31 (entirely new). There was very little discussion on the measure in the Imperial Parliament.

<sup>2</sup> 48 & 49 Vic. c. 60.

<sup>3</sup> §§ 2 and 30.

<sup>4</sup> § 31.

<sup>5</sup> § 5. At the request of the "legislatures of the colonies," Her Majesty may, by Order in Council, increase the number of representatives of any colony. (Does this mean at the joint request of all the colonial legislatures? Cf. § 1). A "Crown colony" is defined as "any colony in which the control of public officers is retained by Her Majesty's Imperial Government" (§ 1).

<sup>6</sup> § 6.

<sup>7</sup> §§ 4 and 11.

<sup>8</sup> § 11.

<sup>9</sup> §§ 10 and 13.

<sup>10</sup> §§ 12 and 13.

The authority of the Council is almost purely legislative, and extends to the following matters—

- (i.) The relations of Australasia with the islands of the Pacific.
- (ii.) Prevention of the influx of criminals.
- (iii.) Fisheries in Australasian waters beyond territorial limits.
- (iv.) The service of civil process of an Australasian court out of the jurisdiction of its own colony.
- (v.) The enforcement of judgments of courts of law of *any* colony beyond the limits of the colony.
- (vi.) The enforcement of criminal process beyond the limits of "the colony" in which it is issued, and the extradition of offenders.<sup>1</sup>
- (vii.) The custody of offenders on board ships belonging to the Colonial Governments beyond territorial limits.
- (viii.) Any matter which at the request of "the legislatures of the colonies" Her Majesty may refer to the Council.
- (ix.) Any matter "of general Australasian interest" upon which the various colonial legislatures may legislate within their own limits, and which has been referred to the Council by the legislatures of any two colonies.
- (x.) Questions relating to any two or more colonies or their relations with one another, which the governors of these colonies, upon an address of the legislatures of such colonies, shall refer to the Council.<sup>2</sup>

But every bill passed by the Council must be presented for the Royal Assent to the Governor of the colony in which the Council is sitting, who may assent to, refuse, or reserve the measure, or suggest amendments in it.<sup>3</sup> The assent to a reserved bill must be notified to the Council or proclaimed in the colonies affected within one year from its receipt by the Home Government, and, within a similar time, a measure to which the Governor's assent has been given may be disallowed.<sup>4</sup>

When duly assented to, the Acts of the Federal Council have the force of law, and override colonial enactments, throughout the colonies represented, except in the case of legislation on matters specially referred by the legislatures,<sup>5</sup> which binds only the referring colonies and those which subsequently adopt it.<sup>6</sup>

Moreover, the Federal Council may make representations to Her Majesty on matters of general Australasian interest, or

<sup>1</sup> Does this mean *any* colony, or only a colony within the Australasian group? There is no definition of "colony" in the Act.

<sup>2</sup> 48 & 49 Vic. c. 60, §§ 15 and 16.

<sup>3</sup> § 17. Every bill on subjects 1, 2, and 3 *must* be reserved, unless previously approved of by Her Majesty.

<sup>4</sup> §§ 18 and 19.

<sup>5</sup> § 15 (i).

<sup>6</sup> §§ 20, 22.

on the relations of the colonies with the possessions of foreign powers.<sup>1</sup>

The Federal Council Act was adopted by Victoria, as from the 9th December 1885, by the (Victorian) Act 49 Vic. No. 843. This statute provides that the representatives of Victoria in the Council shall be appointed and removed by the Governor in Council. They must be members of Parliament, and, where practicable, Responsible Ministers of the Crown.<sup>2</sup> Their appointments, resignations, and removals must be notified by message to both Houses of Legislature within fourteen sitting days from their taking place.<sup>3</sup> No matter is to be referred from Victoria under the provisions of the Federal Council Act, except by Act of the Parliament of Victoria.<sup>4</sup>

The necessary preliminaries having been complied with, the Federal Council held its first session, at Hobart, in January 1886. On this occasion Victoria, Queensland, Tasmania, Western Australia, and Fiji were represented.<sup>5</sup> At the second session, held in 1888, Fiji did not appear. At the third, in 1889, Fiji was still unrepresented, but South Australia appeared.<sup>6</sup> The Council has passed a few Acts, the most important, perhaps, of which are the 49 Vic. No. 3, on the subject of the service of civil process out of the jurisdiction of the court issuing it, and the 49 Vic. No. 4, the "Australasian Judgments Act 1886." By an Act of the year 1889, Victoria has also referred to the Federal Council the following subjects—

- (i.) The laws relating to letters-patent.
- (ii.) The naturalisation of aliens of European descent.
- (iii.) The status of corporations and joint stock companies.
- (iv.) The recognition in other colonies of orders and declarations of the Supreme Court in matters of lunacy.
- (v.) The compulsory production to the Supreme Court of documents or property required for the purposes of proceedings in the Supreme Court of any other colony.<sup>7</sup>

There has been one meeting of the Federal Council since this Act was passed, but only one step was taken to give effect to it.

<sup>1</sup> 48 & 49 Vic. c. 60, § 29.

<sup>2</sup> 49 Vic. No. 843, § 3.

<sup>3</sup> § 4.

<sup>4</sup> § 6. Presumably this section cannot limit the powers conferred on the Governor by the 16th section of the Federal Council Act, but it will be noticed that those powers must be exercised with the advice of the Executive Council (§ 1).

<sup>5</sup> Cf. volume of *Votes and Proceedings*.

<sup>6</sup> South Australia has since withdrawn.

<sup>7</sup> 53 Vic. No. 1002.



And it has been very generally felt that the Federal Council can, at the best, only be regarded as a step in the direction of union. There are two main objections to it as a federal organ.

In the first place, its membership is purely optional. Not only may any colony refuse to join, a power which has been used by the great colony of New South Wales, the mother of four members of the group, but any member which is opposed to any proposal, however vital to the interests of the others, may cripple its prospects of success by withdrawing from the union. It is not surprising, therefore, to find that the matters with which the Federal Council has hitherto dealt have been those only of second-rate importance.

But, in the second place, the absence of an executive and a judiciary of a federal character leaves the Council in the position of a limbless trunk. The Acts of the Council are, doubtless, binding upon the executive officials and the courts of the various colonies represented in it, and so long as there is but little difference of opinion upon the subjects with which it deals, these agents are doubtless sufficient. But, in the event of a real conflict of views between one colony and another, it is too much to assume that the machinery of a colonial government would be promptly and effectively used to enforce legislation of which it did not approve, and which, possibly, had been passed at the suggestion of its rival. And, even in times of harmony, the absence of a revenue and visible engines of power must tend greatly to weaken the influence of any legislative body.<sup>1</sup>

It is not surprising to find, therefore, that a very decided movement in favour of a closer union is on foot. As is well known, a conference met at Melbourne in February 1890, to consider the preliminaries of a new attempt. All the Australasian colonies, with the exception of Fiji, were represented, and if cordiality of expression go for anything, the prospects of ultimate success are good. The conference did very nearly all that it could do. It thoroughly and openly debated the whole subject in a session of several days' duration, and ultimately adopted resolutions binding its members to use their efforts to procure the immediate appointment by their

<sup>1</sup> As a matter of fact, the term *Federal Council* is misleading. The union at present existing is one of the rare examples of *Confederation* now surviving.

various legislatures of delegates to a Constituent Convention.<sup>1</sup> Most of the colonies have already appointed their representatives, and it is generally anticipated that the Convention will meet early in the year 1891.<sup>2</sup> It is, however, to be noticed that New Zealand, though in the most friendly way, has intimated clearly that she will be unable to join a union at the present time. If it is accomplished, the Federation will, for the present at least, be Australian, not Australasian.

Meanwhile, it may be permissible to point out, that if the Australian colonies accomplish federation under existing circumstances, they will succeed in a political experiment for which there is practically no precedent in modern times. All through modern history there has been one and but one determining cause of political union between communities—physical force, or the fear of physical force. In Switzerland, Germany, Austro-Hungary, Sweden and Norway, the United States of America, Canada, Mexico, Central America, the tale has been always the same. No community has consented to link its fortunes with the fortunes of another, save when instigated by fear of violence from that other or a third power. Many attempts have been made on other grounds, many other excellent motives have suggested themselves to thinking men. But the determining cause, the dead lift over the hill, has always been force or the fear of it. It is curious to notice how, even in the history of Australia, the same factor has been potent. Three times before this the Australian colonies have made distinct efforts towards union. The dates of these efforts are, as we have seen, 1856 and the following years, 1870, and 1881-3. Which three dates coincide with the Crimean War, the Franco-Prussian War, and the real or fancied aggressions of France in the New Hebrides. And even the present attempt, though not directly due to fear of aggression, and on that account the more remarkable, is still largely due to military circumstances. A reading of the correspondence which led to it shows clearly that the occasion, at least, of the Federal Conference of 1890 was suggested by the report of Imperial experts on Colonial defences.

<sup>1</sup> Cf. report of proceedings presented to Victorian Parliament.

<sup>2</sup> The Convention has now (August 1891) become a thing of the past. Some account of its proceedings will be found in Appendix D.

It is not surprising that it should be so. Every community contains many persons whose importance and, possibly, emoluments, may be lessened by any surrender of its independence. Those who are responsible for a particular policy fear for its continuance under the new *régime*. Those who are now supreme may, after union has come, be subordinate. Some of their most cherished prerogatives may disappear. The gain of the community may be their personal loss. So long as the community is apathetic, the influence of these men is naturally great. And the community is busy about other things, and prefers to shut its eyes to dangers ahead, until an appeal to its physical fears arouses its attention. Then, if the danger is vivid enough, the community insists upon the obstacles being removed. If the French fleet were once to strike a successful blow against the English on the great ocean highways, the Federal Union of Australia would be accomplished in three months. If no such event happens, it may not be realised for thirty years.

And yet it would indeed be a rash thing to say that this long delay must intervene. It is true that the Australian colonies are attempting a task which is almost without precedent. But it will not be the first experiment in politics which some of them, at least, have made. To say nothing of the ballot system, which, in addition to the doubtfulness of its utility, labours under the disadvantage (in this respect) of ancient precedents, we may point to the fact that Victoria, South Australia, and New Zealand are engaged in the unprecedented task of building up an extensive social, political, and industrial fabric on the unalloyed basis of voluntary labour. If they succeed in doing this, in an age remarkable above all things for the migratory character of its manual labourers, but remarkable also for the revolutionary tendencies of its theories on the subject of labour and employment, they will indeed inaugurate a new era in the world's history, and establish a claim on mankind, as the solvers of one of the most perplexing of the problems of the age. If they succeed here, they will without doubt succeed in the far easier task of accomplishing federal union.

## CONCLUSION

WHEN a work of any kind has been well performed, it seems almost ungracious to criticise the machinery which has been used in its performance. But the ungraciousness is more apparent than real. If men are brought face to face with an undertaking, the essential parts of which must be accomplished at once, they naturally seize the first accessible tools and endeavour to make them suffice. As the extreme urgency of the case disappears, they are glad to use improved machinery to complete and maintain their undertaking, machinery which obviates the necessity for the waste of labour attendant upon imperfect methods. And they will then hardly be prepared to find fault with a friend who ventures suggestions in this direction ; still less to quarrel with him for simply speculating as to their future course of action, without desire to influence it.

When the founders of the Victorian political system took upon themselves the task of organising the colony upon a self-governing basis, they had no time to spare for choice of methods. The exigencies of the situation were so acute, that they simply seized the nearest implements, and fell to work. The pressure of circumstances sharpened their faculties, and the result of their labours was effective for existing circumstances, if not finally complete.

But this is not to say that, upon reflection, they would have maintained the supreme fitness of the methods employed for the task in hand. As a matter of fact, their scheme was adopted nearly *en bloc* from English politics, and few persons who live under it (so powerful is the influence of association) realise how very peculiar that scheme is.

The Cabinet system, which was the real result of the grant

of Responsible Government in 1855, is a purely English production, and, unlike some other English discoveries in politics, has made very little way outside the Empire. It is commonly supposed that all countries which have adopted a representative parliament, based on English models, have also adopted the Cabinet system. No belief could be more misleading. The United States of America, Federal Germany, Austro-Hungary, Spain, Italy, Belgium, Switzerland,<sup>1</sup> possess representative assemblies, under one name or another, and these representative assemblies have generally some machinery for attacking single members of the executive who actually infringe the law. But this is a very partial imitation of Cabinet government; and even in France, Holland, and Swedo-Norway, where English ideas are more nearly reproduced, the system cannot be said to be an unalloyed success. On the other hand, Cabinet government has been the universal ambition of the English-speaking dependencies of the British Empire. In Canada, Cape Colony, and Australasia, a grant of self-government has always meant the Cabinet system. It will be worth while to look for a moment at the nature of this peculiar scheme of government.

I think it not too much to say, that, for the Cabinet system to work, not perfectly, but at all, three conditions must be present. And if we look at the historical origin, as well as the present circumstances of Cabinet government, we shall see that these conditions were present at the time of its appearance.

In the first place, to constitute a Cabinet, it is necessary to have a number of officials accustomed, from social or political causes, to act together. In other words, every successful  
 ✓ Cabinet must contain the principle of cohesion. This was, in effect, the great difficulty in the way of the introduction of the Cabinet system. William III. wished to entrust the government of the country to the most distinguished men of all opinions and connections. But events were too strong for him, and it is one of the most interesting studies in modern history to watch how, in the closing years of the seventeenth century and the beginning of the eighteenth, government gravitated,

<sup>1</sup> I do not, of course, suggest that Switzerland borrowed her representative institutions from England. But, in most of the other cases I have named, English influence is apparent.

by an irresistible tendency, into the hands of a body of men allied by social and political ties. The family relationships of the Churchills, Spencers, and Godolphins, of the Russells and Montagus, the Walpoles and Townshends, the Carterets and Pettys, the Pitts, Grenvilles, and Wyndhams, often decided the composition of Ministries during the eighteenth century. It is even said that Cabinet government grew out of the practice of weekly dinners, initiated by a famous statesman. But, in a more moderate way, it may safely be alleged that the process of forming a Cabinet in early days often resembled the division of a great estate amongst the various branches of a family, rather than the construction of a national government.

In the second place, the Cabinet system could hardly have been evolved without the existence of clearly-defined parties, divided by sharp and unmistakable barriers. During the critical period of its evolution in England, this clear distinction existed. The Whigs were pledged to the parliamentary succession, with freedom of worship and press, and other substantial political ideas. The Tories were really Jacobites, and, in their hearts, abhorred the Revolution. Each Ministry knew that its conduct was being watched by jealous opponents, and that its failure meant, not merely expulsion from office, but possibly proscription or banishment. Thus the principle of Ministry and Opposition, based on real differences of ideas and hopes, was firmly established. Without this principle, the Cabinet system, as we know it, could not have been produced.

And, thirdly, it was necessary that there should be in existence a strong body of received tradition upon political conduct. It has been so often pointed out that the Cabinet system depends entirely on the observance of maxims which are never enunciated in legal form, that I need not dwell on the subject. But I may remark that one cardinal maxim of this tradition, the maxim of deference to the opinion of Parliament, had been generated in the minds of the eighteenth-century statesmen by a series of events so striking as to leave no room for misapprehension. The men who wished to avoid the fate of Strafford and Laud had to follow the example of Finch, Windebank, and Clarendon. In other words, an unpopular minister offered resignation to avoid impeachment, and, as the punishment was less, it was the more readily demanded. It

required conduct so bad as to be almost criminal to found an impeachment. But mere errors of judgment soon came to be looked upon as necessitating a resignation.

We see, then, that Cabinet government grew out of a combination of three special conditions—the presence of groups of influential officials accustomed to act together both in society and politics, the existence of strongly-defined parties and policies, and the habit of deference to political tradition. If we turn to Victoria at the present day, we shall hardly find these conditions existent there.

In the first place, the element of cohesion is wanting. It is true that there are now a large number of persons who have been born in the colony, and that the vast majority of immigrants come either from the British Islands or other Australian colonies. But, within these limits, there is practically no end to the diversities of habit, education, mode of thought, and lineage which exist. If there is one feature more striking than another about Victorian society (in its largest sense) it is its atomic character. Men come and they go. They are thought nothing the worse of for being new men, and hardly the better for being old. A very few families have branched out and intermarried with each other, but the extent of genealogic society is very small. Locality, also, is a far less powerful element of cohesion than in older countries. Amongst immigrants, it is natural that it should be so. They who have crossed twelve thousand miles of sea will not shrink from leaving their abodes in the land of their adoption. And, even amongst natives, it is at present rare to find any deep attachment to a particular locality.

Still more strikingly absent is the second condition. Practically speaking, there are no political parties in Victoria. There are still faint echoes of bygone battles, but they have lost their meaning. Other cries may in the future arise. Some day the feeling of native against immigrant may raise a real political question, but at present it would be idle to say that it is a substantial factor in politics. All the old questions—extension of the franchise, vote by ballot, payment of members,—have been settled. We have practically confessed this truth. For the last seven years we have been content with so-called “Coalition” Ministries, and the ardent politicians, who have

demand a return to severer times, have forgotten that it is impossible to have party government unless there are parties.

But it may be said that, if there are no political questions, there are, and there have been, economic questions upon which the community has been keenly divided. That is quite true. There has been one great struggle on an economic subject; a still greater struggle on another is now going on. In the battle between Free Trade and Protection there was a perfectly legitimate basis for a formation of parties. But that struggle is over, at least for the present. And the great economic question of the day, the relation of Capital to Labour, is not, for a special reason, capable of being used as a basis of party government.

The reason is that, upon this question, each party holds one House of the Legislature, and party questions must be fought out in a single House, just as two combatants must fight in one ring. Broadly speaking, the Legislative Council is the organ of capital. Its restricted franchise, the property qualification of its members, the size of its constituencies and the consequent expense of its elections, the fact that its members are unpaid, all render it practically certain that it will be filled by men of wealth, who quite naturally take the capitalist view of the situation. The opposite incidents of the Assembly tend, as naturally, to make it the mouthpiece of labour. And as it is obviously necessary that each of these two great parties should be duly represented in the government of the country, the present state of things is so far satisfactory, that any proposal to extinguish either branch of the legislature carries on its face this obvious injustice, that its effect would be to deprive one party or the other of all voice in the management of affairs.

But, although the abolition of one House of the Legislature would be manifestly unjust, it is possible that an amalgamation of the two would be of advantage. There is little doubt that a somewhat slavish copying of English institutions has resulted in placing the Legislative Council in an anomalous position, in which much of its usefulness is lost. There can be no reason, for example, why the members of a representative body such as the Council should be precluded from dealing with questions of finance. The prohibition has enabled the Assembly to per-



petrate at least one flagrant piece of class legislation.<sup>1</sup> And, in other respects, the analogy upon which the two Houses are framed altogether breaks down when the circumstances of the colony are considered. Of course, if the two Houses were combined, and all the members of the combined House were elected on the same basis, injustice would be done, for the plan would be almost certain to suit one party better than the other. But, as the practice of European countries shows, there is no reason why all the members of a representative body should be elected on the same basis. And it is more than probable that, in their earlier days, what are now the separate houses of the Parliaments of European countries sat together as united bodies.

Thirdly, it must be confessed that in Victoria the binding force of political tradition has been considerably weakened. In some respects it is still strong, but in others, and especially on some of those points most essential to the working of the Cabinet system, it tends to break down. The proof of this assertion lies in the record of certain facts which have happened during political crises, but which are not, perhaps, very pleasant to refer to specifically. On broader grounds, we may safely say that the whole tendency of modern thought is to do away with the influence of tradition, not less political tradition than other forms, and thus to weaken one of the conditions most essential for the working of the present system. And it does not need special insight to see that, if the rather delicate traditions of Cabinet government break down, the system will degenerate more and more into a cynical struggle for office, in which, as the prizes are not very great, the competitors engaged will not necessarily be of a very high order of merit. In fact, Parliament has already marked its appreciation of the truth that the working of Cabinet government is not altogether satisfactory under colonial conditions, by removing from the control of the Ministry of the day certain large departments of business which used to belong entirely to it. And if this tendency continues, if important departments of public business are made permanent, and their management placed in the hands of non-political officials, the Cabinet will more and more recede from

<sup>1</sup> I allude to the "Land Tax Act 1877," which imposes a tax upon the owner of a grazing estate of 640 acres, worth £3000, but lets the owner of a piece of land upon which a street of suburban houses has been built go scot free.

its old position of working head of the executive system, and assume a new *status* as a committee of inspection, which committee may itself ultimately become permanent.

As a final criticism, we may note also that the Cabinet system sins against one of the cardinal maxims of democracy. If there is one article of democracy's creed more easy to discover than another, it is the jealousy of paid officials. The doctrine of democracy is that no man who holds a paid office is to be trusted with a share in the government of the institution from which he draws his salary. The plan of the municipalities, where the executive officials are rigidly excluded from the legislative bodies, is the ideal plan of democracy. The "interested expert" is its aversion, for all laymen dread the influence of professional knowledge. And against this doctrine the Cabinet system sins in the most open way.

But it may be said that it is idle to criticise a scheme which is now an essential of the political system; that, however unsuited Cabinet government may really be to the circumstances of the case, it cannot now be dispensed with.

My answer is, that an elementary study of history reveals the truth that there are very few essentials in politics, and that institutions which are not really suited to the circumstances in which they exist are apt to disappear. But, to be more specific, I may point, in conclusion, to tendencies which may possibly result in the euthanasia of the Cabinet system in Victoria. For I do not think, for a moment, that it is likely to be forcibly or even consciously displaced.

If I have succeeded, in this book, in reproducing the picture of Victorian government as it appears to my own eyes, it will be evident from a perusal of it that the power and influence of the central government are out of all proportion with those of the local government. Many causes have contributed to this result, but they do not all continue.

In the first place, Victoria was settled at a time when central government in England was abnormally strong, and local government unusually weak. The great increase in the influence of Parliament of the United Kingdom, consequent upon the Reform Act of 1832, made itself felt even in Australia. All through the earlier history of the mother colony, it is the desire to reproduce parliamentary institutions

which is the motive power of political life. Municipal institutions awaken no enthusiasm.

Secondly, the character of the immigration to Victoria, especially after the gold discoveries, tended in the direction of centralism. The immigrants were chiefly men whose ideal was a town life, with its excitements and conveniences. Many of them had no inducement to settle in the country. They had no children to start. They cared nothing for agriculture. Victorian scenery was not attractive. So, when the gold rush waned, they gravitated back to and by their presence increased the towns. And as more immigrants came, they all passed into the arena of Melbourne, many of them never passing out of it. Even from the very first, but most decidedly from 1855, the note of Victoria has been town life, and especially Melbourne life. And it is only lately, and under the influence of powerful inducements, that a country population has begun to radiate from the towns.

But, thirdly, the character of the country itself has had much to do with the intense centralism. A country which contains many mountains and impassable rivers, dense forests and wide lakes, which is also infested with physical dangers, is the country of local government. The scattered settlements are cut off from one another by substantial boundaries, and their members do not lightly risk the dangers of travel. They find their interests at home, and devote their attention to the regulation of them. But such dangers have never been great in Victoria. There have been, and still are, it is true, large extents of forest in which an inexperienced traveller may easily lose his way. But the mountains are few, the rivers and lakes insignificant, and there are broad plains of boundless extent across which, even before the days of roads and railways, it was easy for travellers to make their way. Consequently there was always a tendency, for such settlers as had actually gone out into the wilderness, to gravitate back again to Melbourne.

Finally, a most important factor has been the character of the immigration. If tradition speaks the truth, the ancient immigrations into Western Europe were by tribes of kindred blood, who settled down upon the new lands in spontaneously formed groups representing the old blood relationships. And

so the local groups appeared long before the large political aggregates were formed out of them. But there was no such process in Victoria. Although in some cases the immigrants were sent out by government agency, there was no cohesion amongst them. They came as individuals, not as groups. Those who settled in villages bought their land at the Government sales, or selected it at the Government land office, and went to strangers, as well as to a strange land. It is not wonderful, therefore, that the spirit of local cohesion should have been singularly absent all through the history of Victoria, and that no local organisation should have grown up at all able to balance the central organisation at Melbourne.

But some of these causes have already disappeared, and others are disappearing. As the population settles down and forms local ties, as children grow up who learn to look upon particular places as their homes, as more capital is invested in rural industries, as the habit of local co-operation under municipal government increases, above all, as the patrimony still at the disposal of the central government is distributed, and the localities no longer look to the Treasury for continual help, a spirit of local independence will arise. With the pressure of population upon the means of subsistence, people will find the advantage of developing local resources. And thus their attention and their ambitions will be turned more and more in the direction of that part of the government machinery which immediately affects their interests. Then, when this has happened, the full importance of municipal government will be appreciated, and municipal government will begin seriously to compete in influence and attractiveness with the central power. It will then be seen that a highly-centralised form of government is really inconsistent with democratic ideals. For the true democracy, in which each citizen takes a direct share in the business of government, or at any rate of legislation, cannot be worked over large areas. To adapt it to the enlarged conditions of modern communities it has been necessary to admit the principle of representation. And, after all, representation is either merely a makeshift, or it is aristocracy disguised.

And it is probable that if an increased interest in municipal government does come, it will be followed by demands

for increased municipal powers. The restrictions on municipal legislation will be removed, the control of the local police, the appointment of the local judiciary, will be demanded. And gradually the central government will be deprived of all those matters which are not obviously of universal concern, such as railways, posts, telegraphs, and the like. For when there is no common danger to be feared, the tendency towards localism generally appears, especially in democracies.

And if the tendency should manifest itself to any substantial degree, it is easy to see how it will work against the Cabinet system. For as the central Parliament sinks in importance, its mere caprice will no longer be allowed to oust a set of officials who are doing their work to the satisfaction of the country. There will come a time when Ministers, their powers being less than now, will decline to retire upon a hostile vote, and the country will approve, or at least tolerate them. And then the permanence of the executive, or, at any rate, its security for a definite period, will be acknowledged. But, in that event, the question of appointment will, of course, assume a new phase, and as the Parliament will no longer be able to oust a Ministry at its pleasure, it will no longer be possible for Ministers to take office in the old way. Possibly the electors will claim to appoint directly the head of the Ministry, leaving him to choose his colleagues, as in America, or the Parliament may formally elect the Ministers, as in Switzerland.

In fine, it may well be doubted whether the Cabinet system is at all suited to a community such as Victoria. It was evolved by a close oligarchy, whose members were keenly susceptible to the influence of tradition and the opinion of their order, who were bound, by the circumstances of the case, to stand by one another, and who were kept constantly on the alert by the fear of political disaster. It has descended to a fortuitous assemblage of unconnected units, having little reverence for tradition and small respect for the opinion of their fellows, bound to one another by no ties save those of immediate and temporary expediency, and living in a peaceful political atmosphere.

## APPENDIX A

(Specimen Minute of the Executive Council of N. S. W. in 1837.)

M. 3866. 28th Jan. 1837.

Government House  
Jan. 28, 1837.

St. Andrew's Church, Sydney.

Minute No.  $\frac{13}{1837}$ .

*First P. Magistrate,*  
*30th Jan. 1837,*  
*37/2536.*

Inform the 1st Police Magistrate that the Building St. Andrew's Church is shortly to be commenced, and that some other place must be found for the stocks.

*Surveyor-General for*  
*description,*  
*22d Feb. 1837.*

Let arrangements be made for conveying the Site for that church to Trustees, as the Bishop of Australia has intimated to me his wish of beginning to build immediately.

*Colonial Architect,*  
*31st Jan. 1837.*

Instruct the Colonial Architect to give the Bishop any assistance his Lordship may require in preparing the design of the intended Church.

R. B. (i.e. "Richard Bourke.")

The Honourable  
The Colonial Secretary  
etc.

(Indorsed.)

Surveyor-Gen.—A measurement of this allotment was directed by Col. Sec. letter No. 37/163 and a description requested in order that the same may be conveyed to Trustees under the recent Act. The Surveyor's description is here used and will serve for purposes required. The intended line of George Street has been preserved.

Gov. decis. "Let me see a Tracing."

*5th Aug. 1837. Surv.-General,*  
*37/7129.*

## APPENDIX B

(Specimen Minute of the Executive Council of Victoria, 1855.)

Council Chamber, Melbourne.

14th May 1855.

Present.

His Excellency the Lieutenant-Governor.

The Hon. the Colonial Secretary. The Hon. the Attorney-General.

"	"	Acting Colonial	}	"	"	Collector of Customs.
		Treasurer.				
"	"	Auditor General.				

The Council having assembled in accordance with adjournment, the Minute of proceedings on the 10th instant is read and confirmed.

At His Excellency's suggestion the discussion of the proposed Rules concerning the exportation of Gold is resumed.

It is advised that Regulations to the following effect be promulgated.

*[Here follow the Rules.]*

His Excellency lays upon the table a plan furnished by the Surveyor-General showing the township of Ballarat, and with the advice of the Council approves of the same.

His Excellency informs the Council that he has been requested to appoint Claude Farie, Esq., Chairman of a meeting convened in terms of the Municipal Districts Act, 18 Vic. No. 15, and it is advised that the request made by a Committee of the residents at Prahran be complied with.

The nomination of Trustees for Church of England purposes, viz. at Wangaratta Messrs. G. Faithful, F. G. Docker, Dobbyn, Clark, and Foord; and at Hamilton Messrs. Fetherstonhaugh, Puckle, Nowlan, Graham and Blastock is then with the advice of the Council approved by His Excellency.

Grants of money in aid of the Presbyterian Church as solicited by the Rev. J. Hetherington, Moderator, viz. for (£400) Four Hundred Pounds in aid of a Minister's Dwelling at Tarraville, and for (£296) Two Hundred and Ninety-Six Pounds in aid of a Minister's Salary at Colac, are with the advice of the Council

approved by His Excellency on the report of the Auditor-General that the requisite funds are available.

*(Other similar applications for grants for ecclesiastical purposes.)*

An application for the approval of Messrs. Preshaw, Beauchamp, and Joshua as Trustees of the Castlemaine Mechanics Institute being laid on the table by His Excellency it is advised that it be approved.

Applications for renewal of Licences to ship Seamen in the several cases of James Chapman and James Hendy are laid before the Council, and the Police authorities having reported favourably in each case it is advised that they be sanctioned.

The recommendation of the Council on a former occasion that D. S. Campbell, Esq., be offered a vacant seat as Commissioner of Savings Banks having been acted upon, and Mr. Campbell's willingness to act being shown, in a letter laid upon the Council Table by His Excellency, it is advised that Mr. Campbell be appointed accordingly.

His Excellency announces to the Council that Despatches have been received since the last sitting of the Council conveying to him separate commissions as Captain-General, and Governor-in-Chief of the Colony, and as Vice-Admiral of the same, and that he is about to cause reference to be made to the Attorney-General in order that the steps which it may be necessary to take in giving effect to the Commissions may be adopted in due course.

The Council is then adjourned *sine die*.

G. W. RUSDEN,  
*Clerk of the Council.*



## APPENDIX C

(Statistical Summary of Victoria at the close of the  
respective periods.<sup>1</sup>)

Item.	1842.	1850.	1855.	1889.
Population . . .	23,799	76,162	364,324	1,118,028
Immigrants by sea . .	4,136	10,760	66,571	84,582
Revenue <sup>2</sup> . . . .	£108,381	£357,403	£3,492,210	9,006,044
Land in Cultivation . .	8,124 acres	52,341 acres	115,135 acres	2,627,262 acres
Live Stock (Head) . .	1,509,190	6,432,068	5,166,101	5,145,415
Imports (value) . . .	£277,427	£744,925	£12,007,939	£24,402,760
Exports ( „ „ ) . . .	£198,783	£1,041,796	£13,493,338	12,734,734
Urban Municipalities	(1)	(2)	(2)	59
Rural Municipalities .	—	(2)	(2)	130
Factories . . . .	—	(46)	278	3,137

<sup>1</sup> These figures, with the exception of those enclosed in brackets ( ), are taken from the Victorian Year Book for 1889-90, compiled by Mr. H. H. Hayter, C.M.G., Government Statist.

<sup>2</sup> In 1842, 1850, and 1855 the financial year ended on the 31st December. Since 1871 it has ended on the 30th June.

## APPENDIX D

### THE NATIONAL CONVENTION OF 1891

ONLY a short space can be given to the important measure drafted by the Federal National Australasian Convention which sat at Sydney during the months of March and April 1891. The Convention consisted of thirty-five delegates, chosen by the legislatures of the seven colonies of New South Wales, Victoria, Queensland, South Australia, New Zealand, Tasmania, and Western Australia, in pursuance of the resolutions carried at the conference held in Melbourne in the previous year.<sup>1</sup> The delegates were not, of course, authorised to conclude any final arrangements; they were merely to frame a Federal Constitution which was afterwards to be submitted to the various colonies and, finally, to the Imperial authorities. After five weeks of animated debate the Convention produced a measure, which was ultimately adopted without formal opposition, though several members reserved the right to refuse to recommend it to their constituents if, after further consideration, they could not bring themselves to agree with its provisions. Whatever may be the substantial merits of the measure, it is an admirable piece of drafting, and it will be comparatively easy to give a short analysis of its contents.

The federal aggregate which it is proposed to create is to bear the name of the "Commonwealth of Australia," and its legislative powers are to be vested in a Governor-General, appointed by the Queen, and a Parliament of two Houses, to be known respectively as The Senate and The House of Representatives.<sup>2</sup>

The Senate, which will represent the "States Right" principle,<sup>3</sup> will consist of eight members from each colony, chosen by the Parliament of such colony for a period of six years, and retiring in

<sup>1</sup> The resolutions gave each colony power to appoint seven delegates. All the colonies named availed themselves of it to the full extent, with the exception of New Zealand, which sent only three delegates. The voting was by heads, not by colonies. Western Australia had just been made a self-governing colony by the 53 & 54 Vic. c. 26, which did not, however, make "Responsible Government" compulsory.

<sup>2</sup> Cap. I. § 1.

<sup>3</sup> But the voting will be by heads. § 2.

alternate sections at the end of every three years.<sup>1</sup> The House of Representatives, which will represent the National principle, will consist of members chosen on the basis of population by the electors in each colony for the more numerous House of the Parliament of that colony. Until otherwise provided by the Parliament of the Commonwealth, the ratio is to be one member to every thirty thousand of the population; but no one of the existing colonies represented in the Convention is to have less than four members.<sup>2</sup> The Parliament of a colony may determine the electoral divisions for the return of its Representatives, but where a colony excludes the members of a particular race (not being aboriginal Australians<sup>3</sup>) from the franchise for its more numerous House of Parliament, the numerical basis of federal representation in that colony is to be proportionately reduced.<sup>4</sup> The members of the House of Representatives are to sit for three years,<sup>5</sup> and there is to be a session of Parliament in every year.<sup>6</sup>

No property qualification is required either for Senators or Representatives, but a Senator must be of the age of thirty years, he must be entitled to vote at the election of members to the House of Representatives, he must have resided for five years within the limits of the Commonwealth, and he must be either a natural-born subject of the Queen or a naturalised subject of five years' standing; while a Representative must possess similar qualifications, except that the periods in his case are reduced to twenty-one years and three respectively.<sup>7</sup> The members of both Houses are to receive payment for their services, at first at the rate of £500 a year.<sup>8</sup> The usual disqualifications of office, interest in a public contract, foreign allegiance, insolvency, and conviction for crime, attach to members of both Houses.<sup>9</sup> Moreover members of the Parliament of the Commonwealth are not to be capable of sitting in the Parliament of any constituent colony.<sup>10</sup>

The Parliament of the Commonwealth is invested, subject to the provisions of the Constitution, with power to legislate on a great variety of subjects, including international and intercolonial trade, Customs and Excise duties, posts and telegraphs, military and naval defence, navigation and shipping, statistics, coinage and banking, weights and measures, negotiable instruments, insolvency, copyrights and patents, naturalisation and aliens, marriage and divorce, intercolonial legal process, immigration and emigration, "external affairs and treaties," intercolonial river navigation, and railways used for national purposes.<sup>11</sup> It is also endowed with the *exclusive* right of legislation in respect to the people of any race<sup>12</sup> for whom

<sup>1</sup> Cap. I. §§ 9, 12.

<sup>2</sup> §§ 24, 27.

<sup>3</sup> Cap. VII. § 3. Aboriginal Australians are excluded from calculation in any case.

<sup>4</sup> Cap. I. § 26.

<sup>5</sup> § 24.

<sup>6</sup> § 7.

<sup>7</sup> §§ 15, 32.

<sup>8</sup> § 45.

<sup>9</sup> §§ 47-49.

<sup>10</sup> Cap. V. § 10.

<sup>11</sup> Cap. I. § 52.

<sup>12</sup> Not including aboriginals in Australia or Maoris in New Zealand.

it is deemed necessary to make special laws, to the government of such territory as may be surrendered to the Commonwealth for the seat of government or as sites for national purposes, and to the control of the Public Service of the Commonwealth.<sup>1</sup> The House of Representatives is to have the exclusive power of originating Supply and Appropriation Bills, which the Senate may affirm, reject, or return with suggestions, but not amend. But laws imposing taxation are to deal with the imposition of taxation only, and, except in Customs Acts, with one subject of taxation only; and no vote of *appropriation* may be passed by the House of Representatives, except upon the request of the Government.<sup>2</sup> The powers of the Governor-General, with regard to assent, refusal, and reservation of bills, are substantially the same as those of the Governor of Victoria in respect of Victorian legislation,<sup>3</sup> except that there is no provision for compulsory reservation of bills on any subjects.

The executive power and authority of the Commonwealth, which are to extend to the execution of the provisions of the Constitution and the laws of the Commonwealth,<sup>4</sup> are to be exercised by the Governor-General as the Queen's Representative, with the advice of a Federal Executive Council, to consist of members summoned by the Governor-General, and holding office during his pleasure.<sup>5</sup> The Governor-General may from time to time appoint officials during pleasure to administer such departments of State as he may establish, and such officials may be chosen and sit as members of the Commonwealth Parliament. They are to be members of the Federal Executive Council and "the Queen's Ministers of State for the Commonwealth."<sup>6</sup> But the number of officials who may sit in Parliament is limited to seven, and the offices which these officials may hold may be designated by Parliament.<sup>7</sup> The appointments to all other offices under the Commonwealth are vested in the Governor-General in Council,<sup>8</sup> and the Commonwealth is at once to take over the departments of Customs and Excise, Posts and Telegraphs, Military and Naval Defence,<sup>9</sup> Ocean Signals, and Quarantine, assuming the obligations of the constituent colonies in connection with such matters.<sup>10</sup> It is also provided that all powers which, at the date of the establishment of the Commonwealth, are vested in the Governor of or any officer or authority in a colony, with respect to any matters which, under the Federal Constitution, pass to the Executive of the Commonwealth,

<sup>1</sup> Cap. I. § 53.

<sup>2</sup> §§ 54, 55.

<sup>3</sup> §§ 57-59. (See *ante*, p. 72.)

<sup>4</sup> Cap. II. § 8.

<sup>5</sup> §§ 1 and 2.

<sup>6</sup> § 4.

<sup>7</sup> § 5.

<sup>8</sup> *I.e.* the Governor-General acting with the advice of the Federal Executive Council. § 3.

<sup>9</sup> But the command-in-chief of all the forces is vested in the Governor-General alone. § 9.

<sup>10</sup> §§ 7 and 10.

shall vest in the Governor-General in Council, or the corresponding subordinate official of the Commonwealth.<sup>1</sup>

To provide for the judiciary functions of the Commonwealth, the Parliament is empowered to create a Federal Supreme Court, consisting of a Chief Justice and at least four other judges, appointed by the Governor-General in Council, but holding during good behaviour, and only removable upon an Address of both Houses of Parliament. The Federal Supreme Court is to be a final Court of Appeal from all other federal tribunals, and also from the highest courts of final resort in each constituent colony; and the Federal Parliament may provide that appeals from such last-mentioned courts which have hitherto lain to the Queen in Council shall be brought to and finally determined by the Federal Supreme Court.<sup>2</sup> But power is reserved to Her Majesty to grant leave to appeal from the Federal Supreme Court to Herself in Council "in any case in which the public interests of the Commonwealth, or of any [constituent colony], or of any other part of the Queen's Dominions are concerned."<sup>3</sup> Parliament may also constitute and define the powers of other federal tribunals; but jurisdiction may not be conferred on such tribunals except in cases under the Constitution, under federal legislation or treaty,<sup>4</sup> in Admiralty or Maritime matters, in matters relating to foreign official representatives, in matters in which the Commonwealth is a party, in controversies between constituent colonies, or relating to the same subject matter claimed under the laws of such different colonies.<sup>5</sup> The trial of all indictable offences cognisable by any federal tribunal is to be by jury.<sup>6</sup>

The provisions of the Constitution relating to Trade and Finance are very important, but it will only be necessary to specify those which deal with the financial settlement between the colonies. These were, in fact, the very crises of the whole task of the Convention. The others are merely the usual revenue clauses of a Constitutional Government.

The existing Customs and Excise laws of the constituent colonies are to remain in force, unless altered by the various colonies, until an uniform system is provided by the Parliament of the Commonwealth, but the duties levied under such laws are to be paid to and collected by the federal officials.<sup>7</sup> Upon the establishment of an uniform system, the Customs and Excise laws of the various colonies

<sup>1</sup> Cap. II. § 11. This section is very wide. It is not unlikely that an attempt to enforce it would give rise to serious difficulties.

<sup>2</sup> Cap. III. §§ 1-5.

<sup>3</sup> § 6.

<sup>4</sup> It will be noticed that this section, as well as § 52 (26) of Cap. I., impliedly authorises the Commonwealth to enter into direct negotiations with other countries, a power which has been exercised *de facto* by the Australian colonies amongst themselves, but which is usually considered an Imperial function.

<sup>5</sup> Cap. III. § 7.

<sup>6</sup> § 11.

<sup>7</sup> Cap. IV. § 7.

are to become void, and the exclusive power of imposing Customs and Excise duties, and of granting bounties on production or export of goods, is to be exercised by the Parliament of the Commonwealth,<sup>1</sup> subject to the necessity for absolute equality and freedom of trade throughout the Commonwealth.<sup>2</sup> From the date of the imposition of such an uniform system, "trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free."<sup>3</sup> Moreover the Parliament of the Commonwealth may annul laws made by any constituent colony derogating from such freedom of trade;<sup>4</sup> and the Commonwealth itself may not give any preference in its Trade or Revenue laws to the ports of one part of the Commonwealth over those of another.<sup>5</sup>

The expenditure of the Commonwealth is to be charged to the several constituent colonies in proportion to their populations, and the surplus of revenue over expenditure is to be returned to each colony in proportion to the amount of revenue raised therein. But, in estimating the amount of revenue collected in a colony, the amount of duties levied on goods afterwards exported to another constituent colony is to be deducted from the revenue of the former colony, and credited to that of the latter.<sup>6</sup> And there are to be deducted from the surplus otherwise payable to a colony the amounts granted by way of bounties to any of its people,<sup>7</sup> and also the amount of the interest on any of its debt which may have been taken over by the Commonwealth.<sup>8</sup>

The bill also contains some provisions which affect the internal administration of the constituent colonies, or, as they are technically termed in the measure, "the states." These provisions will, of course, if the measure passes into law, become part of the constitutional law of each colony which adopts it.

After confirming to the authorities of each state the powers residing in them at the date of the establishment of the Commonwealth, except so far as they are inconsistent with the proper legislation of the Commonwealth,<sup>9</sup> the bill goes on to provide that there shall in every state be a Governor appointed and removed in manner determined by its Parliament,<sup>10</sup> but that all communications required by the Constitution of any state to be made by the Governor to the Queen shall be made through the Governor-General of the Commonwealth, and that the Queen's pleasure shall be made known through him.<sup>11</sup> Moreover no state is to impose any Customs duties except such as are necessary for executing its inspection laws; and such inspection laws may be annulled by the Commonwealth.<sup>12</sup> Nor may any state, without the consent of the Federal Parliament, impose any duty of tonnage, or raise or maintain any military or

<sup>1</sup> Cap. IV. § 4.

<sup>2</sup> Cap. IV. § 8.

<sup>3</sup> § 13.

<sup>4</sup> § 12.

<sup>9</sup> Cap. V. §§ 1-4, 6.

<sup>5</sup> § 11.

<sup>10</sup> §§ 7, 8.

<sup>6</sup> Cap. I. § 52 (2).

<sup>7</sup> § 9.

<sup>11</sup> § 5.

<sup>8</sup> § 9 (3).

<sup>12</sup> § 13.

naval force, or impose any tax on any property belonging to the Commonwealth. On the other hand, the Commonwealth must not impose any tax on property belonging to a state, and it must protect every state from foreign invasion, and, if required by the Executive Government of a state, from domestic violence.<sup>1</sup> Five other things a state is absolutely prohibited from doing. It must not coin money, it must not make anything but gold and silver a legal tender, it must not make any law prohibiting the free exercise of any religion, it must not make or enforce any law abridging the privilege or immunity of citizens of other states, and it must not deny to any person within its jurisdiction the equal protection of the laws.<sup>2</sup>

Any of the existing colonies may, upon adopting the Constitution, be admitted to the Commonwealth, and the Federal Parliament may admit other new states upon such terms as it may think fit.<sup>3</sup> Moreover, the limits of a state may, with the consent of its Parliament, be altered by the Federal Parliament.<sup>4</sup>

Finally, the Constitution may be amended by legislation passed by an absolute majority of the Federal Parliament and approved by a majority of state conventions elected by the electors to the House of Representatives of the Commonwealth and summoned in manner provided by the same authority; but the people of the states whose conventions approve of the amendment must be a majority of the people of the Commonwealth.<sup>5</sup> Every such amendment will, of course, be subject to the royal assent, and any amendment by which the proportionate representation of a state, or the minimum number of Representatives thereof, is diminished, is not to become law without the consent of the Convention of that state.<sup>6</sup>

The most obvious feature in the Constitution which we have just analysed is its strongly central character. To use terms of a corresponding date in American history, it is "Federal" rather than "Democratic." The feature is seen very clearly in the rule that all communication with the Imperial Government is to be through the Governor-General, in the exclusion of members of the states' parliaments from the Commonwealth Parliament, in the constitution of the Federal Supreme Court as a final Court of Appeal from the highest state courts, and in the prohibition of fiscal autonomy, and the raising of military forces in the states. The chief guarantees of the Democratic or States-right principle, which the Constitution affords, are the equality in the numbers of the Senators for each state, the minimum limit of Representatives and the power of each state to regulate the electoral basis on which they are chosen, and the states' veto on electoral amendments.

Secondly, we may notice that, in one or two points, the

<sup>1</sup> Cap. V. §§ 14, 19.

<sup>2</sup> §§ 15-17.

<sup>3</sup> Cap. VI. §§ 1, 2.

<sup>4</sup> § 4.

<sup>5</sup> Cap. VIII. § 1.

<sup>6</sup> *Ibid.*

Constitution goes near to impair what have hitherto been exclusively Imperial prerogatives. It expressly provides that the states may regulate the appointment and dismissal of their own Governors, a power which, if carried into law, will certainly authorise a state to declare its headship elective and thus, practically, to annihilate Responsible Government. It almost puts an end to appeals to the Imperial tribunals by limiting the right of the Queen in the allowance of appeals to very special classes of cases. And, at least impliedly, it authorises the Federal Parliament to enter into direct relations with foreign states. In the case of the Canadian Constitution, the Imperial authorities consented<sup>1</sup> to allow the provincial Lieutenant-Governors to be appointed by the Governor-General, himself an Imperial official; it remains to be seen whether they will give up all control over the appointments in Australian colonies. The clause as it now stands was carried by the barest majority in the Convention,<sup>2</sup> and it will be remembered that any legislation by which a colony proposed to alter the method of appointing its Governor would be subject to the veto or reservation of a Governor who was an Imperial official. It was indeed proposed by Sir George Grey to annul the necessity for the reservation of any state legislation, but the proposal was negatived by a decided vote.<sup>3</sup> The restriction on Her Majesty's right to grant leave to appeal was also carried by a very small majority; the subject having been made the ground of a special memorial by Mr. Justice Richmond, of the Supreme Court of New Zealand.<sup>4</sup> The implied recognition of a right to enter into direct relations with foreign powers is probably something quite new in the history of Colonial government, although the Federal Government of Canada is specially charged with the *execution* of treaties entered into by the Imperial authorities.<sup>5</sup> It is possible that the contemporary question of the Newfoundland fisheries may have had something to do with the matter.

One other subject of great importance may be noticed in connection with the Federal Constitution. This is its attitude on the matter of Responsible Government. The nature of Responsible Government has been previously dealt with in this work; it will not therefore be necessary to repeat the explanation. But it is worth noticing, in view of certain suggestions with regard to the future of that institution which the author has ventured to make, that the attitude of the Commonwealth Constitution on the subject is studiously neutral. The Constitution of Victoria, by providing that four Ministers *shall* sit in Parliament, and by subjecting Ministers to re-election on the acceptance of office,

<sup>1</sup> By 30 Vic. c. 3, § 58.

<sup>2</sup> Cf. vote in Minutes of Proceedings of the Convention (Official Record), p. cxii.

<sup>3</sup> *Ibid.*

<sup>4</sup> Copy in *ibid.* p. cxci.

<sup>5</sup> 30 Vic. c. 3, § 182.



makes Responsible Government compulsory in Victoria. But the Federal Constitution contains no such requirements. It allows seven officers administering departments of State to sit in Parliament, and it requires that such officers shall be members of the Executive Council and "the Queen's Ministers of State for the Commonwealth." The last title was the subject of great debate in the Convention.<sup>1</sup> It was added, after the bill had left the Constitutional Committee, as a substitute for another proposed amendment, viz.: "Responsible Ministers of the Crown." It seems to have been thought that the new title conveyed by implication the right to use prerogative powers which would not be conferred by the mere fact of membership of the Executive Council. If this construction be correct, such powers can only be acquired by an implied grant of Her Majesty's prerogative rights; for a Minister of State, apart from express statute, has no personal powers save those which belong to him as a subject of the realm. And it is quite possible that the Imperial authorities might hesitate long before advising Her Majesty to delegate irrevocably by parliamentary statute, to Australian Ministers, those powers which in England she merely allows her Ministers to exercise at her pleasure. It is to be observed, however, that the words, whatever else they may import, do not necessarily involve the recognition of Responsible Government.

Apart from the measure itself, it may be permissible to say one word as to the composition of the Convention which passed it. This Convention, like the Conference of 1890, was purely parliamentary in its character. It was chosen by Parliaments, and consisted entirely of members of Parliaments. The heterogeneous and comprehensive character of the English House of Commons at the present day is apt to lead Englishmen to suppose that Colonial parliaments are similarly comprehensive. As a matter of fact all representative bodies constituted on uniform bases tend to become the possession of a particular class. It has been so in English parliamentary history. It is not so just now, because one class is being pushed out and another class is pushing its way in, and there is a meeting of the waters. But in Australia a social revolution has already effected the change which is being effected in England. As a consequence, the National Convention hardly represented all classes. In Australia, as a general rule, neither the great merchants nor the great landowners, nor the most eminent lawyers, especially those lawyers who ultimately become Supreme Court judges, are to be found in Parliament. It is evident that a country like Australia is poorly represented by any assembly which does not contain some reasonable proportion of these elements. Unquestionably there were lawyers of great ability in the Conven-

<sup>1</sup> See debate in Official Record, pp. 371-6.

tion, but they were not lawyers of a judicial stamp, and an observer can hardly help suggesting that the presence in the Convention of a few names so respected as those borne by the judges of the Supreme Courts of the Australian colonies, would have lent an additional guarantee to the work of the Convention.

Of the fate of the measure it would be rash to prophesy. Its acceptance, even after the sanction of the Imperial authorities has been granted, is intended to be purely voluntary in the case of each colony, and there is a general feeling that such acceptance can only be satisfactorily ascertained through the medium of a plebiscite. It is not proposed to take any further steps in the matter until at least three colonies have adopted it. If there is little enthusiasm for the movement, there is little opposition to it. Other questions excite greater interest. It may be that the bill will have to wait till these are settled.



# INDEX

**ADDERLEY, Mr.**, 196, 197  
 Addresses to Governor, 97, 98, 101, 110  
 Agriculture, Minister of, 304  
 "Agricultural Allotments," 291, 292  
 Agricultural Areas, 287, 288, 289  
 "Agricultural and Grazing Lands," 291, 29  
 Aliens, may not sit in Parliament, 237, 238  
 "Appropriation Act," 281  
 Assembly, Legislative, 253-258  
 Attorney-General, 284, 285  
 Audit of Public Accounts, 282-284.  
 "Auriferous Lands," 292  
 Australia, first colonised, 11  
 Australian Agricultural Company, 35  
  
**BAIL, 355**  
 Bailiffs, of County Courts, 350  
 Ballot, 242  
 Bankrupts, etc., 238  
 "Bank Sheet," the, 284  
 Barry, Sir Redmond, 161, 176  
 Batman, John, 23  
 Bearbrass, 27 (*see* "Melbourne")  
 Bishopric of Australia, subdivided, 126  
 Board of Trade, 4, 132  
     — Land and Works, 262, 285, 288, 290, 291, 292, 295, 297  
     — Public Health, 262, 263  
 Boards of Advice, 298, 299  
 Border Police, 46, 110  
 Boroughs, 172, 328 (*see* "Local Government")  
 Bourke, County of, 45  
     — District Council of, 90, 91, 127  
 Bourke, Sir Richard, claims Port Phillip as part of N. S. W., 25; his action confirmed, 26; visits Port Phillip, 28  
 Bribery, 243  
 Budget, the, 280-282  
 Bye-elections, 240  
 By-laws (*see* "Local Government")  
  
**CABINET SYSTEM, 206, 269-276, 375-384**  
 Cadet Corps, 302

Canada Act, Mr. Pitt's, 10  
     — Constitution of, 193  
 Capital cases, position of Governor in, 233  
 "Cash Sheet," the, 284  
 Central and Local Governments, relations of, 363-365  
 Central Road Board, 170, 171, 285  
 Chairman of General Sessions, 358  
 Chief Secretary, 278, 279  
 Circuit Courts, 175  
 Civil List, of 1842, 73; of 1850, 133, 199, 219  
 "Clerical Division," of Public Service, 309, 310  
 Clerk of the Peace, appointed at Melbourne, 29  
 Collectors of Imposts, 282  
 Colonial Office, 200  
 Colonial Reform Association, 147  
 Commissioners of the Treasury, 279, 280  
 Committee of Classifiers, 299  
 Committees, of Privy Council, 4  
 Commons, 290  
 Comptroller of Customs, 167  
 Condell, Henry, first Member for Melbourne, 83, 85  
 Constitution, of 1823, 12  
     — of 1823, 14  
     — of 1842, 69  
     — of 1850, 141-167  
     — of 1855, 190-198  
     — alteration of, 246-249  
 Constitutional Bills of 1849 and 1850, in English Parliament, 146-149  
 Contractors, Government, 238  
 Convicts, 238, 321  
 Council, Executive, of N. S. W., 18, and Appendix A  
     — of Victoria, 157, 158, 179, 193, 194, 207, 208, 231, 232, 267-276, and Appendix B  
     — of Foreign Plantations, 3; abolished, 3; revived, 3; abolished, 4  
     — of Trade, 3

- Council, Legislative, of 1824, 12, 13  
 — of 1829, 16, 17, 43, 170  
 — of 1848, 69, 71, 83, 84, 85,  
 90, 91, 97, 101, 104, 110, 111, 117,  
 119, 123, 129, 134, 151-154  
 — of 1851 (Victorian), 141-144,  
 161, 163, 179, 182, 183, 189, 210,  
 214  
 — of 1855, 191-205, 250-252  
 "Country" lands, 38, 286  
 County Courts, 349-352  
 Criminal Prosecution, process of, 321  
 Cromwell, colonial policy of, 2  
 Crown, its constitutional position, 1, 2  
 "Crown Colonies," meaning of, 11  
 — Lands, 24, 25, 33, 39, 94-121,  
 137, 151, 177-188, 218, 219, 231,  
 286-297  
 — Regulations, of 1824, 34, 37;  
 of 1831, 37, 44; of 1840, 40, 43;  
 of 1844, 108, 110; of 1846, 111; of  
 1848, 103, 113-115  
 — Commissioners of, 19, 110  
 — Districts, 40  
 — and Survey, Commissioner of,  
 285, 296  
 — Leases Act, of 1846, 111  
 — Sales Act, of 1842, 94, 95,  
 184, 188, 198, 208; protests against,  
 95  
 Customs, transfer of, 164; collection of,  
 281  
  
 DECLARATION, of property qualification,  
 241  
 Deeds, Registry of, 51  
 Defence, Minister of, 300  
 — Council of, 300  
 Dendy, Mr. Henry, case of, 41, 42  
 Deposits by candidates for Parliament,  
 241  
 District Judge of Port Phillip, 50  
 — Councils (*see* "Local Government")  
 — Road Boards, 170, 172  
 Districts, squatting (*see* "Squatting  
 Districts")  
 — electoral, 70, 72, 77, 82  
  
 EDUCATION, 222, 297-300  
 Elections, machinery of, 78-80, 152-154,  
 238-243  
 Election offences, 243, 244  
 — questions, trial of, 81, 84, 162, 244,  
 245  
 Elector's rights, 239, 242  
 Electoral divisions, 238, 239  
 — registrars, 239  
 Endowments, municipal, 344  
 English Law, how far binding in Vic-  
 toria, 15  
 Estimates, Parliamentary, 280, 281  
 Executive, legal position of, 313-317  
  
 Executive Council (*see* "Council, Execu-  
 tive")  
 Exports (*see* "Imports")  
  
 "FARMERS' COMMONS," 287  
 Fawkner, Mr., 161, 182, 187, 188, 190, 210  
 Federal Council, 369-372  
 Federation, 129, 134, 199, 366-374  
 "Fencing Rate," 295  
 Feudal land system, theory of, 32  
 Financial Year, account of, 280-282  
 "First Division," of Public Service,  
 309, 310  
 Fitz Roy, Sir Charles, arrives, 111; deals  
 with squatting difficulty, 111; de-  
 spatches on Separation, 128, 129 *α*;  
 made Governor-General, 155; arrange-  
 ments thereupon, 156  
 Fixed price system, 39, 41  
 Forces, naval and military, 300-302  
 Forlonge, Mr., 187  
 Franchise, Parliamentary, 70, 142, 148,  
 189, 251, 254  
 — Municipal, 331 (*and see* "Local  
 Government")  
 "Free Port," 30  
 "Free Warehousing Port," 30  
 "Full Court," the, 319  
  
 GAOL, proclaimed in Port Phillip, 28  
 Geelong, 24; police magistrate appointed,  
 29; first land sale at, 38; incorpo-  
 rated, 61; disputed election at, 162;  
 claims under Constitution of 1850,  
 79; population in 1850, 136; two  
 members in 1851, 153  
 "General Assembly," project of, 134;  
 abandoned, 147  
 "General Hewitt," recommendations sent  
 by the, 107  
 General Sessions of the Peace, 357  
 Gipps, Sir Geo., modifies Land Regula-  
 tions, 41; his remonstrance followed,  
 42; criticism of Address of 1843, 99;  
 difficulty over Squatting Question, 110,  
 111; leaves the colony, 111; action  
 with respect to Sir Thos. Mitchell's  
 election, 122; abolishes "North Aus-  
 tralia," 126; despatches on Separa-  
 tion, 128  
 Gladstone, Mr., 146, 147  
 Gold, discovery of, 155, 160, 178; effect  
 on Land Question, 178, 181, 182  
 Government officials, 122, 136, 238  
 Governor, the, his powers and duties,  
 230-235; substitutes for, 234, 235  
 "Governor-in-Council," 233, 240, 260,  
 261, 275, 282, 286, 287, 293, 294,  
 299, 303, 305, 306, 308, 318, 321,  
 322, 327, 347, 349, 352, 354  
 Governor-General, 134, 155, 156, 159,  
 160, 178

Grant, District Council of, 90, 91  
 — Mr., 204  
 Grey, Lord, despatches from, 102, 119,  
 128, 184, 147, 150, 155, 165, 166  
 — elected member for Melbourne,  
 130  
 "Grievances," Resolutions of, 121  
  
 HAINES, Mr. W. C., 161  
 Henty, Mr. S. G., 108  
 Hobson's Bay, 28  
 Hope, Mr., his Squatting Bill, 109  
 Hotham, Sir Chas., Commission, 159,  
 160; difficulty with Ministers, 208-  
 211; his views on Responsible Govern-  
 ment, 212  
 House of Commons, Journals of, 237  
  
 IMPORTS and Exports, in 1842, 66; in  
 1850, 137; in 1855, 221 (and *see*  
 Appendix C)  
 India, 10  
 Insolvency, Court of, and proceedings in,  
 322, 323, 352 *n.*  
 Inspector-General of the Education De-  
 partment, 299  
 Inspectors of mines, 348  
 Instructions, Royal, of 1850, 158  
 — permanent, of 1879, 231  
 "Intermediate" Districts, 113  
  
 JUDGES, may not sit in Parliament, 238;  
 are, *ex officio*, Justices of the Peace  
 (*see* "Supreme Court," "County  
 Courts," etc.)  
 Jury system, introduction of, 19  
 Justice of the Peace (*see* "Magistrates")  
 Justice, Minister of, 302  
  
 LAND QUESTION (*see* under "Squatting,"  
 "Crown Lands")  
 Land and Emigration Commissioners, 39,  
 99, 103  
 Land and Works, Board of (*see* "Board  
 of Land and Works")  
 "Land Orders," 33  
 Lang, Dr., 126, 127  
 Latrobe, Mr., Superintendent, 29  
 — Lieutenant-Governor, 157, 158, 161,  
 163, 166, 180, 183, 189  
 Legislation, powers of, 245, 246  
 Legislative Assembly (*see* "Assembly,  
 Legislative")  
 — Council (*see* "Council, Legislative")  
 Letters-Patent of 21st Feb. 1879, creating  
 office of Governor, 230, 231  
 Licences, gold, issued, 155, 160; income  
 transferred to colonial exchequer,  
 179  
 — pastoral (*see* "Squatting")

Loans, municipal, 344, 345  
 Local Government, scheme of 1842, 87-  
 92  
 — 1850, 128, 130, 133, 148, 168,  
 169  
 — history of, 326-328  
 — existing form of, 329-337  
 Lonsdale, Capt. W., first police magis-  
 trate at Port Phillip, 27, 28, 161  
 Lowe, Mr. Robert, 101, 104, 112, 195,  
 196  
  
 MAGISTRATES (generally), 353-359  
 Maitland, District Council of, 89  
 "Mallee" Lands, 290, 293-295  
 Market, Melbourne, 48  
 Mayors of Municipalities, 341, 342  
 Melbourne (formerly Bearbrass), con-  
 dition in 1836, 27; first meeting at,  
 28; named, 28; obtains Quarter Ses-  
 sions, 29; Court of Requests, 30;  
 divided, 30; made "Free Port" and  
 "Free Warehousing Port," 30; first  
 land sale at, 38; market, 48; first  
 Parliamentary elections in, 83; return  
 of Mr. Condell for, 83; of Earl Grey,  
 130; population in 1850, 136; three  
 members in first Victorian legislature,  
 153; corporation of, 52-61, 79, 127,  
 128, 218  
 Miall, Mr., 196, 197  
 Minerals on Crown Lands, 101  
 Mines, Courts of, 360-362  
 — Minister of, 304  
 Mining, statistics in 1855, 221  
 — Districts, 339  
 — District Boards, 339, 340  
 — Leases, 287  
 Ministers of Religion, 123, 194, 228  
 Mitchell, Sir Thos., 122  
 "Money Bills," 255-258  
 Moreton Bay District (*see* "Queens-  
 land")  
 Municipalities (*see* "Local Government")  
 Municipal clerks, 345, 346  
 — rolls, 331, 332  
 — surveyors, 346  
  
 NAVIGATION LAWS, 31  
 Newcastle, Duke of, 185, 191  
 New colonies, power to create, 75, 145  
 New Zealand, 20, 75, 368, 373  
 Nicholson, Mr., 187  
 Nomination of candidates for Parliament,  
 241  
 Nominee members of Legislative Council,  
 12, 16, 69, 75  
 "Non-Clerical Division," of Public Ser-  
 vice, 309, 310  
 "Non-residence licences," 292  
 "North Australia," 126, 145

- OFFICIAL STAFF**, of N. S. W. in 1835, 17, 18, 19  
 — of Port Phillip in 1842, 63  
**O'Shanassy**, Sir John, 187  
**PAKINGTON**, Sir John, 179, 190, 191, 196, 197  
**Palmer**, Mr. J. F., 161, 187  
**Parliament**, no power at first over colonies, 1  
 — "Victorian," 236-249  
**Parliamentary Reports**, 245  
 "Pastoral Lands," 290, 291  
 "Pastoral Society of Australia Felix," 108  
**Paymasters**, 283  
**Payment of members**, 253, 256, 257  
**Pensions for public officials**, abolished, 311  
**Petty Sessions**, introduced, 19; powers of, 356, 357; procedure at, 357  
**Phillip**, Governor, his commission, 11  
**Police**, of Port Phillip in 1842, 64  
 — of Victoria, 305, 306  
 — Chief Commissioner of, 305, 306  
 — Magistrates, appointed, 27, 28, 29  
 — Courts, introduced, 19  
**Poll**, at Parliamentary elections, 242  
**Population of Port Phillip** in 1842, 65; in 1850, 137; in 1855, 220  
**Portland Bay** (squattling district), 47  
**Portland**, founded, 29  
**Port Phillip** (Victoria) organised, 27; general condition in 1842, 63; in 1850, 136-138  
**Port Phillip Association**, 23, 26  
**Postmaster-General**, 285, 304  
**Pre-emptive right**, 178, 181  
**President of Board of Trade**, 4, 9  
 — of Legislative Council, 240, 251  
**Presidents of shires**, 342  
**Privileges of Parliament and its members**, 237  
**Privy Council**, 2  
 — committees of, 2  
 — orders of, 103, 112, 182, 184, 186  
 — as Court of Appeal, 175, 324  
 "Professional Division," of Public Service, 309, 310  
**Property Qualification for Legislative Council**, 250, 251  
**Public Service Board**, 262, 274, 299, 308, 309, 310, 311  
 — Worship, provision for, 74, 133, 144, 223  
 — places of, 221  
 "Public Account," the, 282-284  
 — Works, commissioner of, 285, 286, 297  
 — Instruction, Minister of, 297  
**QUARTER SESSIONS**, proclaimed at Melbourne, 29  
**Queensland**, separate existence foreshadowed, 42, 145 *n.*; accomplished, 367  
**Questions**, to voters at elections, 242  
**Quit-Rents**, 33, 35, 117-120  
  
**RAILWAYS**, Minister of, 302, 303  
**Railway Commissioners**, 303  
 "Railway Construction Account," 292  
**Rates**, municipal, 342-344  
**Receivers of Revenue**, 282  
**Registrars of Mining Districts**, 348  
 — of County Courts, 350  
**Registry of Deeds**, 51  
**Representative Government**, introduced, 69  
**Requests**, Court of, established at Melbourne, 30  
**Reservation of Bills for Royal Assent**, 232  
**Residence**, required for voters at elections, 242  
 "Responsible" officials, 192, 193, 206-216, 255, 277, 288  
**Returning officers**, 240, 241  
**Revenue of Port Phillip** in 1842, 65; in 1850, 137; of Victoria in 1854, 217; in 1855, 219 (and see Appendix C)  
 — clauses, 72, 73, 143, 252, 255-258  
 — collection of, 282, 283  
 — expenditure of, 283, 284  
**Revision Courts**, 239, 240  
**Roads and Bridges**, 91, 169, 327  
**Roads Trusts**, 170  
**Royal Commission**, of 1854 (Land Question), 186, 187  
**Russell**, Lord John, 145, 147, 195, 198, 199  
  
**ST. PATRICK'S HALL**, first meeting of Victorian Legislative Council at, 161  
**School Districts**, 298  
**Secretaries of State**, origin and history of, 5, 6; no part of Constitution, 7; now always in Cabinet, 8  
**Secretary of State for the Colonies** appointed, 6; office abolished, 7; incorporated with War Department, 7; finally separated, 199  
 "Selectors" (of Crown Lands), 286, 287, 288, 289  
**Separation** (of Victoria from N. S. W.), 125-135, 141  
**Sessions of Parliament**, 236  
 "Settled" Districts, 113  
**Sheriffs**, appointed in Port Phillip, 51  
**Shipping** (Victorian) in 1842, 66; in 1850, 138  
**Shires**, first created, 328 (see "Local Government")  
**Solicitor-General**, 302

South Australia, organised, 20 ; system of land grants in, 39 ; roads, 172  
 Speaker, of the Legislative Council, 71, 84, 161, 187, 211  
 — of the Legislative Assembly, 240, 244, 254  
 "Special" lands, 286, 287  
 "Special" surveys, 41, 42  
 Squatting, 44, 45, 103, 107-116, 181, 187, 178, 182, 186, 187, 188, 221, 288, 290  
 — Regulations of 1836, 46  
 — of 1848, 118-115  
 — Districts, 47  
 — Franchise, 116 (and see "Crown Lands")  
 Stanley, Lord, 100, 109, 123  
 "State Forests," 293  
 Stawell, Sir William, 161, 176, 234  
 Superintendent of Port Phillip (see "La-trobe, Mr.")  
 Supply, Committee of, 280, 281  
 Supreme Court, of N. S. W., 13, 14, 16  
 — of Victoria, 144, 174, 175, 264, 265, 318-321, 322, 323 n., 331, 333, 351  
 Surveyor-General, 285  
 Surveyors (Mining), 348  
 "Swamp Lands," 292  
 Swan River Settlement ("Western Australia"), 20  
  
 TEACHERS in Government schools, 299, 300  
 "Timber Reserves," 293  
 "Town" lands, 38  
 Trade and Customs, Commissioner of, 297  
 Treasurer of the colony, 279-284  
 — of a municipality, 342  
 "Treating," 244

"Trust Fund," the, 283  
 UNDER-TREASURER of Port Phillip appointed, 29  
 "Undue influence," 244  
 "Unsettled" Districts, 113  
  
 VACATION of seats in Parliament, 238  
 Van Diemen's Land (Tasmania), separated from N. S. W., 13 ; roads in, 172  
 Van Diemen's Land Company, 35  
 "Vermin," 291, 295  
 "Vermin Districts," 295  
 Vice-Admiralty Court, first established in N. S. W., 11 ; of Victoria, 323, 324  
 Vice-President of Board of Trade, 4  
 Victoria, creation of, 141 ; boundaries of, 132, 133, 141, 201, 202 ; condition of, in 1855, 217-223  
 Victorian Railway Commissioners, 263  
 Volunteers, 301, 302  
 Votes at elections, counting of, 243  
 — return of, 243  
  
 WAGERS on results of elections, 244  
 Wardens of Mining Districts, 347  
 "Water Reserves," 293  
 Water Supply, Commissioner of, 304  
 Ways and Means, Committee of, 280, 281  
 Wearing of badges, 244  
 Wentworth, Mr., "protests" of, 151  
 Westernport (Squatting District), 47  
 Westgarth, Mr., 151, 152  
 Wheat, average yield per acre, 297  
 Williamstown, named, 28  
 Women, ineligible for Leg. Council, 238  
 — for municipal council, 330  
 Writs, for Parliamentary elections, 240, 241

THE END







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		SALLUST . . . . .	See pp. 33, 44.
		SCHILLER . . . . .	See p. 35.
		SHAKESPEARE . . . . .	See pp. 12, 45.
		TACITUS . . . . .	See pp. 33, 47.
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